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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN THE MATTER OF
GARY AIRCRAFT CORPORATION,
Debtor.

GARY AIRCRAFT CORPORATION,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN H. BENNETT, JR.
Attorney for Petitioner,
Gary Aircraft Corporation

Of Counsel:

GILPIN, MAYNARD, PARSONS,
POHL & BENNETT
Three Riverway, Suite 400
Houston, Texas 77056
(713) 623-8800

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTION PRESENTED

Whether a bankruptcy court may exercise its jurisdiction to disallow claims alleged against a debtor made in a proof of claim filed by the Government, if those claims arise out of a contract with the United States otherwise subject to litigation before an agency board of contract appeals or the United States Claims Court.

LISTING OF PARTIES

The Official Creditors Committee of Gary Aircraft Corporation is a party appellee to the proceeding before the United States Court of Appeals for the Fifth Circuit that is not listed in the caption of the case in this Court. Pursuant to Supreme Court Rule 28.1, Petitioner lists the following of its subsidiaries and affiliates which are not wholly owned by the Petitioner: Madison Equipment Corporation, Hondo Municipal Airport, Hondo, Texas; Aircraft Machinery Corporation, Hondo Municipal Airport, Hondo, Texas.

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On Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit. *Gary Aircraft Corporation v. United States of America (In re Gary Aircraft Corporation)*, 698 F.2d 775 (5th Cir. 1983).

OPINIONS BELOW

The opinion of the Court of Appeals is reported. *Gary Aircraft Corp. v. United States of America (In re Gary Aircraft Corporation),* 698 F.2d 775 (5th Cir. 1983). The opinion of the District Court is not reported. *In re Gary Aircraft Corp.,* No. 79-CA-342 (W.D. Tex. June 24, 1981). The opinion of the bankruptcy court on the motion to stay proceedings in the bankruptcy court (APP. D) is not reported. *In re Gary Aircraft Corp.,* No. 5A-76-Bk-443 (W.D. Tex. Bankr. Ct., June 29, 1979).

JURISDICTIONAL STATEMENT

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit, from which this petition is brought, was issued on February 25, 1983. No rehearing was sought, and no extension of time for the filing of this petition has been sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

BANKRUPTCY ACT OF 1898, 11 U.S.C. § 1, *et seq.* (Supp. 1977) [hereinafter referred to as ACT]. (APP. G at 123a).

BANKRUPTCY REFORM ACT OF 1978, 11 U.S.C. § 101 *et seq.* (Supp. 1979) [hereinafter referred to as CODE]. (APP. K at 142a)

BANKRUPTCY REFORM ACT OF 1978 §§ 201, 241, 402, 404 (uncodified); Public Law 95-598, November 6, 1978, 92 Stat. 2549 [hereinafter referred to as REFORM ACT] (APP. L at 155a).

CONTRACT DISPUTES ACT OF 1978, Pub. L. No. 95-563, 92 Stat. 2383 [codifed at 28 U.S.C. § 1491 (Supp. 1983) and 41 U.S.C. § 601, *et seq.* (Supp. 1983)] [hereinafter referred to as DISPUTES ACT]. (APP. M at 158a).

FEDERAL PRIORITY STATUTE, 31 U.S.C. §§ 191, 192 (Supp. 1977). (APP. H at 131a).

WUNDERLICH ACT, 41 U.S.C. §§ 321, 322 (1976). (APP. J at 141a).

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ARMED SERVICES PROCUREMENT REGULATIONS, 32 C.F.R. § 7-103-12 (1976). (APP. N at 167a).

DEFENSE ACQUISITION REGULATION, 32 C.F.R. § 7-103.12 (1982). (App. O at 169a).

STATEMENT OF THE CASE

In 1970, Petitioner, Gary Aircraft Corporation ("Gary"), entered into Air Force Contract No. F41608-71-D-0289 ("Contract 0289") with the Respondent, the United States of America ("Government"), to overhaul R2800 aircraft engines. In 1974 Gary and the Government entered into Air Force Contract No. F41608-74-D-1645 ("Contract 1645") providing for continued engine overhaul after conclusion of Contract 0289. In 1975 the Government terminated Contract 1645. This litigation arose out of that termination and related but separate disputes regarding control of property, production and quality in performance of Contracts 0289 and 1645.

In 1975 Gary initiated claims against the Government under Contracts 0289 and 1645 to recover increased contract performance costs and to set aside the purported

default termination of Contract 1645. Pursuant to the contract "disputes clause", the claims were presented to an administrative contracting officer and then appealed to the Armed Services Board of Contract Appeals ("ASBCA"). The ASBCA docketed these two claims against the Government on January 21, 1977, and later scheduled a hearing on them for October 3, 1977.

On October 28, 1976 Gary filed its original petition commencing the reorganization proceeding below with the United States District Court for the Western District of Texas, San Antonio Division, and the matter was referred to the bankruptcy court. On November 30, 1976, the Government elected to file a proof of claim in bankruptcy court. Initially, the Government's proof of claim alleged two claims against Gary, one for $145,533.52 in excess reprocurement costs allegedly incurred from termination of Contract 1645, and the other for $566,399.12 in serviceable property allegedly lost during performance of Contract 0289. The Government's proof of claim, as finally amended, alleged six claims against Gary totalling $2,686,114.15. The Government's proof of claim alleged that there were no setoffs or counterclaims to Gary's alleged debt to the Government. The Government asserts its claim is entitled to priority in payment.[1]

The Government never sought bankruptcy court leave to continue prosecution of claims against Gary. Nevertheless, on April 13, 1977, an administrative contracting officer issued a decision purportedly holding Gary liable for $1,895,203.12 for unserviceable property allegedly

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1. ACT § 64a(5), 11 U.S.C. § 104 (Supp. 1977), together with 31 U.S.C. §§ 191, 192 (Supp. 1977). *See, United States v. Press Wireless, Inc.*, 187 F.2d 294 (2d Cir. 1951), *interpreting United States v. Oklahoma*, 261 U.S. 253 (1923).

lost by Gary. The decision gave notice that any appeal by Gary to the ASBCA was required within thirty days. The Government amended its proof of claim filed with the bankruptcy court to include this $1,895,203.12 claim.[2]

On June 10, 1977, Gary moved the bankruptcy court to disallow the claim of the Government, and the matter was set down for trial as a contested matter.[3] On July 7, 1977, the Government moved to stay all discovery in the bankruptcy court concerning issues raised in Gary's motion to disallow the Government's claim. On July 18, 1977, at the conclusion of an evidentiary hearing on the Government's motion to stay, the bankruptcy court denied the Government's motion to stay.[4]

Following denial of the Government's motion to stay, the bankruptcy court tried the claims and objections of the parties, rendered an opinion on the Government's motion to stay (APP. D), announced its decision of the case (APP. E), and on June 29, 1979, signed and entered an order denying the Government's motion to stay and

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2. Neither this claim nor the other claims for allegedly lost property were included in the ASBCA case set for hearing October 3, 1977. However, except for two comparatively small claims, the Government's claims against Gary and Gary's claims against the Government arose out of the same basic transaction and occurrences. APP. D at 68a-69a (¶¶ 51-56).

3. BANKR. R. 914; 11-63.

4. The court of appeals opinion implies that the Government's motion to stay was not denied on July 18, 1977 but was carried along until after trial. "On February 22, 1979, the bankruptcy court denied, finally, the Government's Motion to Stay and Vacate." APP. A at 3a-4a. In fact, the Government's motion was denied on July 18, 1977. APP. C. However, the Government did not request or propose entry of an appealable written order denying its motion. BANKR. RULES 801, 803.

vacate. APP. F. The district court affirmed. *In re Gary Aircraft Corporation,* No. 79-CA-342 (W.D. Tex. June 24, 1981). APP. B. The court of appeals reversed and remanded, holding that the bankruptcy court improperly exercised its jurisdiction in liquidating the Government's contract claims against Gary because it was required to defer to the ASBCA for purposes of liquidating Gary's claim.

The court of appeals only reviewed whether the bankruptcy court erred in denying the Government's motion to stay. App. A at 5a, n.2. Accordingly, although other issues were presented for review to the district court and court of appeals, the sole question before this Court is whether a bankruptcy court may exercise its jurisdiction to disallow claims made against a debtor in bankruptcy reorganization proceedings and alleged in a proof of claim filed by the Government with the bankruptcy court, if those claims arise out of a contract with the Government otherwise subject to litigation before an agency board of contract appeals or the United States Claims Court.

The basis for federal jurisdiction in the court of first instance is Section 2a of the ACT, 11 U.S.C. § 11 (Supp. 1977).

A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT

The opinion of the court of appeals aimed to resolve conflicts between two conflicting sets of federal law and

policy. This holding is of a public importance, and will have widespread general impact that will extend far beyond the parties to this litigation. The issues merit this Court's review by certiorari. *See* 16 C. WRIGHT, A. MILLER, E. COOPER and E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE, § 4004 at 508 (1977).

The jurisdiction of a bankruptcy court to disallow claims against a debtor in bankruptcy is longstanding and has been recently reaffirmed and strengthened by Congress. ACT § 2(1)-(2), (7); CODE § 502(a)-(b). This Court has several times written that a bankruptcy court has full power to inquire into and disallow any claim asserted against the estate of a debtor in bankruptcy. *Lesser v. Gray,* 236 U.S. 70, 74 (1915); *accord Pepper v. Litton,* 308 U.S. 295, 304 (1939); *Katchen v. Landy,* 382 U.S. 323, 329 (1966); *see United States Fidelity & Guaranty Co. v. Bray,* 225 U.S. 205, 218 (1912). However, no decision of this Court specifically holds that a bankruptcy court may disallow claims held by the Government which under non-bankruptcy law would be subject to litigation before an agency board of contract appeals or the United States Claims Court. This Court has twice limited bankruptcy court jurisdiction in favor of administrative tribunals on matters not involving claims against the debtor, *Order of Railway Conductors v. Pitney,* 326 U.S. 561 (1946); *Smith v. Hoboken Road Warehouse & Steamship Connecting Co.,* 328 U.S. 123 (1946), and once held that wise administration required a bankruptcy court to defer to the National Labor Relations Board to liquidate a back wage claim "giving the Board a reasonable time for its administrative determination". *Nathanson v. National Labor Relations Board,* 344 U.S. 25, 30 (1952). This Court has written approvingly of the contract "disputes clause" (APP. N) which limits judi-

cial, though not by its terms bankruptcy court, determination of disputes arising out of a Government contract. *United States v. Joseph A. Holpunch Co.,* 328 U.S. 234 (1946); *United States v. Moorman,* 338 U.S. 457 (1950). The jurisdiction of an agency board of contract appeals to resolve Government claims against contractors, long contractual if not regulatory (APP. A at 5a-9a), is now statutory. Disputes Act, 41 U.S.C. §§ 601 *et seq.* (Supp. 1983); *see* APP. O.

The court of appeals, despite "conflicting mandates" from decisions of this Court, attempted to resolve the conflict between "two inclusive, exclusive, sweeping schemes, both of which the Supreme Court has endorsed". APP. A at 11a. The court below expressly sought to articulate a general, jurisdictional rule for resolution of government contract disputes pending before an agency board of contract appeals.[5] Recognizing that the bankruptcy court did not commit any abuse of discretion in its decision not to defer to the ASBCA,[6] the court of appeals announced a "rule of decision" that as a "matter

5. The Court considered whether there should be a jurisdictional rule regarding government contract disputes before the ASBCA. APP. A at 18a. The ASBCA is an agency board of contract appeals under the Disputes Act 41 U.S.C. §§ 601(b), 706 (Supp. 1983) and revised Defense Acquisition Regulation § 7-103-12 (APP. O). In terms going beyond the ASBCA the court of appeals also considered whether the "generalized ideas about a bankruptcy court's ancillary jurisdiction . . . justify articulating a general rule for resolution of government contract disputes pending before a Board of Contract Appeals." APP. A at 19a.

6. "The bankruptcy court below made detailed findings to support its determination that it should not defer. If the question facing us today were simply whether the bankruptcy court abused its discretion in making that determination, we would clearly have to hold that it did not; the bankruptcy court's decision was neither arbitrary nor capricious, but rather deliberate and reasoned." APP. A at 16a.

of law, almost pure law" a bankruptcy court should never exercise its jurisdiction to disallow Government claims against a debtor in bankruptcy if the claims would be subject to administrative review by an agency board of contract appeals were the debtor not in bankruptcy.

The historically broad jurisdictional grant to bankruptcy courts to determine claims against the debtor has been tempered to permit flexible discretion to defer exercise of that jurisdiction. *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940); *In re Baldwin*, 291 U.S. 610 (1934); 1 COLLIER ON BANKRUPTCY, ¶ 206 (14th ed. 1976); *see* 3 COLLIER ON BANKRUPTCY ¶ 57.15 (3.2) (14th ed. 1976). But the inflexible and nondiscretionary "rule of decision" announced by the court below, call it what you will, is a judge made abolition of bankruptcy court jurisdiction to hear claims asserted against the debtor if they arise from Government contracts.[7] If anything, recent Congressional policy should propel the bankruptcy courts to use flexible discretion rather than a pre-set "rule of decision" in determining whether or not to abstain from exercising their jurisdiction.[8]

The policy favoring "discretion by choice" rather than a "rule of decision" is shown by the hasty generalizations

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7. *See, e.g.*, ACT §§ 2a(2), (7), (15); CODE §§ 502(b)(c); 101(9), (14), (21); 106(b); BANKR. R. 302(a); 11-33(b)(1). *See also*, CODE § 106(a).

8. REFORM ACT § 405(b), makes 28 U.S.C. § 1471(d), enacted by REFORM ACT § 201 but not effective until April 1, 1984, essentially effective for current courts of bankruptcy until April 1, 1984. Section 1471(d) permits a district court or a bankruptcy court to abstain "from hearing a particular proceeding under Title 11 . . ." and "[s]uch abstention, or a decision not to abtain, is not reviewable by appeal or otherwise".

made by the court of appeals on "various factors" which the court concluded were "common to most, if not all" Government contract disputes before agency boards. Perhaps as a general rule liquidation of Government contract disputes does not impair the primary goal of bankruptcy (APP. A at 19a); but in the case at bar the bankruptcy court expressly found that ASBCA liquidation would enable another forum to embarrass and unduly delay the arrangement proceedings (APP. D at 102a [¶ 110]), would be fruitless in many respects because of the ASBCA's limited jurisdiction (APP. D at 102a-103a [¶ 112]), and would materially interfere with and prevent the orderly administration of the Chapter 11 case. (APP. D at 103a [¶ 113]; 102a [¶ 111]). Perhaps as a general rule Government contracting law "tends to be technical and esoteric" so that the court of appeals could not "help but think that the ASBCA m ght . . . [be] better qualified by its experience and expertise" than the bankruptcy court to resolve Government contract litigation (APP. A at 20a); but in the case below the record did not show that specialized technological or other expertise possessed by the ASBCA would be required to determine the Government's claims and the evidence was to the contrary. APP. D at 101a (¶ 108). Indeed, the bankruptcy court found that the Government made no showing of harm that would result from liquidation of its claims by the bankruptcy court (*Id.*) or that liquidation would impair a strong federal policy (*Id.* [¶ 109]). The common use of the "disputes clause" to prevent work stoppage by a Government contractor during existence of a dispute (e.g., 41 U.S.C. § 605(b); APP. D at 74a [¶ 74]) could not be hampered in the case at bar because Contract 1645 had been terminated and relet to another contractor (APP. D at 94a [¶ 103]). The court of appeals overgeneralized

in concluding that "claims running against the Government in addition to claims against the contractor" favor deferral as a "rule of decision" because the bankruptcy court lacks jurisdiction to determine claims against the Government (APP. A at 20a); CODE § 106 provides the Government is now deemed to waive sovereign immunity by filing a proof of claim with the bankruptcy court. In truth, the actual facts of the particular case below[9] provide factual exceptions to each of the factors underpinning the "rule of decision" adopted by the court of appeals, and this is shown by findings that the court of appeals characterized as "neither arbitrary nor capricious, but rather deliberate and reasoned". APP. A at 16a.

Moreover, the "rule of decision" was adopted by the court of appeals with no consideration of several important public issues that this Court should address. Nowhere

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9. Another fact apparently persuasive to the court of appeals was that "[t]he only substantial asset Gary had was its claim against the Government for termination for convenience of the second contract . . . valued . . . at $3,170,724." APP. A at 4a.

> We would not dream of giving the Board of Contract Appeals the broad equitable jurisdiction given to the bankruptcy court. By similar logic, we see no reason to give to the bankruptcy court the determination of the existence of a claim and its valuation when that is within the peculiar expertise of the Board of Contract Appeals. This may be especially true when the sole significant asset of the debtor is a claim against the Government, which *must* pass through the Board of Contract Appeals and Court of Claims.

APP. A at 23a. Gary's Statement of All Debts of Debtor, filed in the bankruptcy court, reflected $4,771,592.70 in debts and its Statement of All Property of Debtor, $7,244,160.72 in assets, as of October 28, 1976. APP. at ¶ 26. As of that time, Gary's liabilities, exclusive of any liability to the Government, were $4,771,592.72, and the aggregate value of its assets, exclusive of its claims against the Government, was $4,275,373.82. APP. D at 62a (¶ 33). Gary's claim against the Government obviously was not its only "substantial" or "significant" asset.

in its opinion does the court of appeals address the Government's failure to seek or show cause for modification of the stay. (APP. D at 91a-93a [¶¶ 99-101]). The stay against prosecuting claims against a debtor without bankruptcy court consent has recently been reconsidered and reenacted by Congress[10] in language clearly showing that Congress contemplated that Government claims would be stayed because it provided limited express exceptions to the stay for Government units.[11] By transmogrifying the bankruptcy court's "discretion by choice" into a "rule of decision" the court of appeals ignores the automatic stay of BANKR. R. 11-44 and effectively has abolished the bankruptcy court's jurisdiction to allow or disallow claims arising out of a Government contract and asserted against a debtor. The holding of the court of appeals thus makes questionable the initial presumption of validity of claims filed with the bankruptcy court (APP. D at 80a [¶ 79]), questions the court's power to discharge claims not timely filed and allowed (APP. D at 80a-81a [¶ 80]), and frustrates the performance of fiduciary duties of the trustee or debtor-in-possession (APP. D at 82a [¶ 81]).[12]

Jurisdictional power by the bankruptcy court to disallow claims against the debtor has been provided since 1898 and is as essential to the jurisdiction of a bankruptcy court under the CODE as it was under the ACT. The policy underpinning the jurisdictional grant to the bankruptcy court is tempered by flexible discretion under the Code

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10. CODE §§ 363(a)(1), (3), (6), (7); 101 (4), (9), (14), (21).

11. CODE § 362(b)(4), (5).

12. *Compare* CODE § 502, presuming validity of claims filed, *with* CODE § 1111, deeming claims filed if scheduled except when scheduled as disputed, contingent or unliquidated. *See also,* CODE §§ 704(4); 1106(a)(1); 1107.

to defer to other tribunals to liquidate claims against the debtor, just as it was under the ACT.[13] Indeed, the courts of bankruptcy presently functioning under the CODE are identical to the court of bankruptcy that authored the decision below under the ACT.[14] In a broad sense the jurisdiction granted to the bankruptcy court by the CODE extends beyond that which was provided by the ACT. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ____U.S.____, 73 L.Ed.2d 598, 604 (1982). The issue presented to this Court by the case below is *limited* to the judicial power of a bankruptcy court to disallow a claim against the debtor in a proof of claim filed by the Government in a bankruptcy court. That issue historically is a matter of summary rather than plenary jurisdiction under the ACT. *United States Fidelity & Guaranty Co. v. Bray*, 225 U.S. 205, 218 (1912).

The substantially contemporaneous DISPUTES ACT (APP. M) and CODE provide for precisely the same jurisdictional face off between the bankruptcy court and the agency board or Claims Court as that which absorbed the attention of the three courts below. The DISPUTES ACT (APP. M), provides that Government "claims against a contractor relating to a contract shall be the subject of a

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13. CODE § 502(c); ACT § 57N.

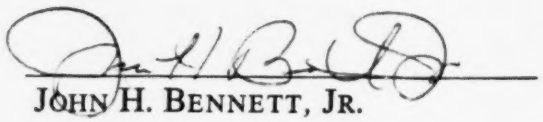
14. The proceeding below was filed with the district court which, under Sections 1(10) and 2a of the ACT, is defined and created as a "court of bankruptcy". Upon filing, the proceeding below was referred under BANKR. R. 102(a) to the bankruptcy court. Pursuant to Section 404(a) of the REFORM ACT, the courts of bankruptcy, as defined under Section 1(10) of the ACT, and created under Section 2a of the ACT, are continued until April 1, 1984. The bankruptcy court established by Section 201 of the REFORM ACT does not come into existence until April 1, 1984, perforce of Section 402(b) of the REFORM ACT. In short, the bankruptcy court below is identical to the bankruptcy courts now functioning under the CODE.

decision by the contracting officer," (41 U.S.C. § 605(a)), "not subject to review by any forum, tribunal, or Government agency" unless an appeal or suit is timely commenced, (*Id.* at § 605(b)), to an agency board of contract appeals, (*Id.* at §§ 606, 607) or "in lieu of appealing the decision of the contracting officer . . . a contractor . . . bring[s] an action directly on the claim in the United States Claims Court. . . ." *Id.* at § 609. The CODE continues bankruptcy court jurisdiction to allow or disallow claims against the debtor. Thus, the issue presented for review, and the general jurisdictional rule announced by the court of appeals, are precisely the same under the ACT as under the CODE, and are precisely the same under the DISPUTES ACT as under the "disputes clause". (APP. N: *see* APP. O).

The current recession has caused numerous businesses, many of them having contracts with the Government, to seek the protection afforded by the CODE. Clear rules to guide the bankruptcy courts, agency boards of appeal, and the United States Claims Court are presently of great public importance, for the practical consequences of a large reorganization proceeding regarding a large Government contractor are as obvious as inevitable. The far-reaching policy consequences of the non-discretionary rule of de-

cision adopted by the court of appeals should be reviewed on writ of certiorari issued by this Court.

Respectfully submitted,



JOHN H. BENNETT, JR.

Three Riverway, Suite 400
Houston, Texas 77056
(713) 623-8800

Attorney for Petitioner,
Gary Aircraft Corporation

Of Counsel:

GILPIN, MAYNARD, PARSONS,
POHL & BENNETT
Three Riverway, Suite 400
Houston, Texas 77056
(713) 623-8800

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing Petition for Writ of Certiorari have this day been served on each of the following by first-class mail, postage prepaid:

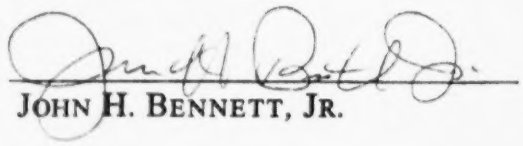
Solicitor General
Department of Justice
Washington, D.C. 20530

Mr. J. Christopher Kohn
Mr. Richmond I. McKay
Attorneys, Civil Division
Department of Justice
Ben Franklin Station
Washington, D.C. 20044

Mr. Edward C. Prado
United States Attorney
655 East Durango Blvd.
San Antonio, Texas 78206

Mr. Joe Warren Jones
Jones & Partain, Inc.
812 N.B.C. Building
San Antonio, Texas 78205

SIGNED this the 24th day of May, 1983.



JOHN H. BENNETT, JR.

APPENDIX A

In the Matter of GARY AIRCRAFT CORPORATION, Debtor.

GARY AIRCRAFT CORPORATION, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES of America,
Defendant-Appellant

No. 81-1391

United States Court of Appeals,
Fifth Circuit

February 25, 1983.

Appeal from the United States District Court for the Western District of Texas.

Before GOLDBERG, GEE and HIGGINBOTHAM, Circuit Judges.

GOLDBERG, Circuit Judge:

This is a stretch case with potential for elastic juridical power in either the bankruptcy court or the Armed Services Board of Contract Appeals. In this appeal we are called upon to review various matters pertaining to the liquidation by a bankruptcy court of claims by the United States against Gary Aircraft Corporation ("Gary") flowing from a contract between the govern-

ment and Gary to overhaul airplane engines.[1] We hold that the bankruptcy court improperly exercised its jurisdiction in liquidating the contract claims and that it should have deferred jurisdiction for the purpose of liquidation to the Armed Services Board of Contract Appeals.

I. INTRODUCTION

A. *Facts—Government Reservations and the Engines*

Gary entered into a contract with the United States Air Force to rebuild Model 2800 aircraft engines, effective as of December 1, 1970. Under the contract Gary was supplied with materials from various government sources to use in the rebuilding process. Beginning in late 1973, the General Accounting Office developed some doubts regarding Gary's handling of government furnished property. The first contract, after extensions, expired on August 31, 1974. Despite the GAO problems, Gary was awarded a second contract to perform the same services beginning September 1, 1974.

During August, 1974, the GAO told the Air Force that drastic measures were needed to protect the government's interests. In response, the Air Force sent a fifty person team to Gary's plant. The team imposed some stringent property and quality control procedures, which appear to have had the effect of severely disrupting Gary's work. Consequently, Gary was unable to meet its

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1. This proceeding arises under the Bankruptcy Act of 1898 as amended, rather than the Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-151326 (Supp. 1979), so we are not affected by the unconstitutionality of the latter act. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, _____U.S._____, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982).

delivery deadlines and the government terminated the second contract for default in March of 1975.

B. *Procedural History*

The contracts between Gary and the government contained the standard disputes clause, establishing a heirachy for resolving disputes arising under the contract. First, the Contracting Officer would address the dispute. Second, the Armed Services Board of Contract Appeals ("ASBCA") would hear the case. Third, the case could go to the Court of Claims under the Wunderlich Act, 41 U.S.C. §§ 321, 322 (1976).

Gary first filed claims under both contracts for the additional costs caused by government changes in the contract. These claims were filed with the Contracting Officer who decided against Gary. The matter was docketed by the ASBCA on January 21, 1977, together with other claims on the contracts. The ASBCA scheduled a hearing for October 3, 1977.

This orderly procedure was complicated on October 28, 1976, when Gary filed under Chapter XI of the Bankruptcy Act of 1898, as amended, 11 U.S.C. §§ 1-151326 (1976 & Supp. 1979). The government filed proofs of claims which Gary moved to disallow in June, 1977. The bankruptcy court set a trial date for the claims for July 18, 1977. The government filed a Motion to Stay and Vacate the bankruptcy court proceedings on July 7, 1977. A hearing on the Motion to Stay was held July 18, 1977. From July 19, 1977 to March 9, 1978, the bankruptcy court heard the testimony on the merits of the government's claims and related issues. This produced a transcript of some 17,000 pages. On Febru-

ary 22, 1979, the bankruptcy court denied, finally, the government's Motion to Stay and Vacate. On June 29, 1979, the bankruptcy court essentially adopted Gary's proffered 1,107 Findings of Fact and Conclusions of Law, covering some 383 pages.

The bankruptcy court determined that the government basically had caused Gary's default, thus the termination for default was viewed as a termination for the convenience of the government. The government's claim was valued at $59,166.06. In order to determine whether the government's claim was entitled to priority over other creditors, the bankruptcy court had to determine whether Gary was solvent. The only substantial asset Gary had was its claim against the government for termination for convenience of the second contract. The bankruptcy court valued this claim at $3,170,724. The bankruptcy court did not purport to be entering a judgment against the government, but merely to be making collateral findings necessary to resolve the question of priority. The government appealed the bankruptcy court's decision to the district court on September 11, 1979; the district court affirmed the bankruptcy court on June 24, 1981. This appeal followed.

Meanwhile, things were still going on back at the ASBCA and Court of Claims. On August 30, 1978, the ASBCA dismissed Gary's appeals without prejudice. On August 1, 1980, on the strength of the bankruptcy court's findings, Gary fiiled a petition in the Court of Claims for recovery on its claim against the government. Additionally, Gary petitioned for recovery of legal fees, lost profits, consequential damages and so on. On January 9, 1981, the Court of Claims dismissed Gary's claim for legal fees

and stayed the remainder pending exhaustion of administrative remedies in the ASBCA. On August 28, 1981, Gary reinstated its appeals before the ASBCA. Those appeals are still pending waiting for this Court's resolution of the government's appeal before us.

C. Issues on Appeal

The government on appeal raises two jurisdictional arguments and two groups of substantive government contract law arguments. First, the government argues that the bankruptcy court should have deferred to the ASBCA for liquidation of all of these claims. Second, the government argues that the bankruptcy court need not have precisely valued Gary's claim against the government. Finally, the government argues the bankruptcy court erred in its valuation of the government's claim against Gary and Gary's claim against the government.

We agree with the government that the bankruptcy court improperly exercised jurisdiction over the liquidation of these government contract claims.[2] We shall first address the nature of the mechanisms for resolution of government contract disputes. Next, we probe the inner reaches of the bankruptcy process. Finally, we shall mediate between the immovable object and the irresistable force.

II. RESOLUTION OF GOVERNMENT CONTRACT DISPUTES

Before turning to the core question of whether the bankruptcy court or the ASBCA should liquidate the government contract claims, we must first delve a little

2. Accordingly, we do not reach the government's other points of error.

deeper into the nature of governmental dispute resolution. More specifically, we are concerned with how the ASBCA gets its customers, by what right the ASBCA resolves disputes. The parties present two polar positions, believing that the correct characterizations of the disputes clause is dispositive of the jurisdictional issue. *See infra* Part IV.C.1. On one hand, the government believes the disputes clause is as binding as if it were statutorily mandated; on the other hand, Gary believes the disputes clause is of no more force than an arbitration clause in a contract between two private parties. We find, on the third hand, that an intermediate view is most compelling; accordingly, our characterization of the disputes clause is not automatically dispositive of the jurisdictional issue. *See infra* Part IV.C.2

The government's most aggressive position is that the disputes clause is, in effect, statutorily mandated. The government claims that the Armed Services Procurement Act, 10 U.S.C §§ 2202-2774 (1976), which provides the authority to issue the Armed Services Procurement Regulations ("ASPR"). ASPR § 7-203-12, 31 C.F.R. § 7-3.12 (1976), mandates the dispute clause in question. Thus, the dispute clause is, in effect, congressionally mandated. The Court of Claims has held, in fact, that this line of reasoning results in contracts being read as if they contained required clauses, even when the actual contract did not. *G.L. Christian & Assoc. v. United States,* 312 F.2d 418, 424 (Ct. Cl.), *cert. denied,* 375 U.S. 954, 84 S.Ct. 446, 11 L.Ed.2d 315 (1963). *See also Chris Berg, Inc. v. United States,* 426 F.2d 314, 317 (Ct. Cl. 1970).[3]

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3. The Fifth Circuit has noted the position of the Court of Claims without endorsing or rejecting it. *Hayes International Corp. v. McLucas,* 509 F.2d 247, 261 n. 21 (5th Cir.), *cert. denied,* 423 U.S. 864, 96 S.Ct. 123, 46 L.Ed.2d 92 (1975).

We do not agree with the government's analysis. It is worth noting that the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (Supp. 1979) does indeed make the disputes clause statutorily mandated, but that was not in effect at the time of the contracts in question here. Our initial point of disagreement is that we find no specific authority in the Armed Services Procurement Act for the ASPRs. Indeed, the Legislative history of the Contract Disputes Act of 1978 notes that "[b]asically the methods and forums for handling such disputes exist by executive branch fiat—that is, by the insertion of contract terms specifying how disputes in specific areas will be resolved —and by agency regulations governing the procedural and substantive adjudication of disputes." S. Rep. No. 1118, 95th Cong., 2d Sess. 2 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5235, 5236. *See also S & E Contractors, Inc. v. United States,* 406 U.S. 1, 18, 92 S. Ct. 1411, 1421, 31 L.Ed.2d 658 (1972) (Board of Contract Appeals "are not statutory creations but are established by administrative regulations. S. Doc. No. 99, 89th Cong., 2d Sess., Operation and Effectiveness of Government Boards of Contract Appeals 20-21."). Many cases hold that dispute clauses gain their compelling force through contractual agreement. *See, e.g., Patton Wrecking and Demolition Co. v. TVA,* 465 F.2d 1073 (5th Cir. 1972), *Bethlehem Steel Corp. v. Grace Line, Inc.,* 416 F.2d 1096, 1105-06 (D.C. Cir. 1969). In summary, we do not view the dispute clause as having the force of congressional enactment.

Gary takes the complementary extreme position that because the dispute clause gains its force through contractual agreement, it is merely a contractual clause. We believe this conclusion is not supported by law, logic, or

common sense. First, the logical underpinnings of the conclusion are flawed. The fact that Gary became subject to the dispute clause by contractual agreement does not entail the conclusion that all the consequences of the dispute clause are "merely" contractual and of little moment. After all, the Constitution is "merely" the product of agreement by the citizens and governments of the thirteen colonies.

Second, the fact that dispute clauses were not statutorily mandated does not mean that they have no official stature. Congress was certainly cognizant of the existence of dispute clauses and at the least condoned them. *See, e.g., United States v. Moorman,* 338 U.S. 457, 460, 70 S.Ct. 288, 290, 94 L.Ed. 256 (1950) ("Contractual clauses such as these have long been used by the Government. No congressional enactment condemns their creation or enforcement."). In face, the only enacted evidence of congressional knowledge of dispute clauses, the Wunderlich Act, 41 U.S.C. §§ 321, 322 (1976), providing for judicial review of Board of Contract Appeals decisions, suggests at least tacit approval. As the Supreme Court has said, a dispute clause

> is something more than a dead letter to be revived only at the convenience or discretion of the contractor. It is a clear, unambiguous provision applicable at all times and binding on all parties to the contract. *No court is justified in disregarding its letter or spirit. . . . This mechanism, moreover, is exclusive in nature. Solely through its operation may claims be made and adjudicated as to matters arising under the contract.*

United States v. Joseph A. Holpuch Co., 328 U.S. 234, 239-40, 66 S.Ct. 1000, 1003, 90 L.Ed. 1192 (1946)

(citations omitted, emphasis added). This is something more than mere contractual verbiage.

Finally, and perhaps most importantly, common sense suggests it is a bit disingenuous to treat the dispute clause as just another binding arbitration clause in a contract between two parties. One has merely to look at the vast body of case law, digests, and treatises, to realize that government contracting law is complex, technical, esoteric, important and monumental. The *raison d'etre* of the various Boards of Contract Appeals is that both expertise and unifomity are needed to resolve adequately and fairly questions within the purview of government contracting law. The keystone of this entire edifice is the dispute clause—hardly just another contract clause.

The parties have attempted to confine our choices by classifying the dispute clause along a spectrum from private law to public law, with their preferences at the two extreme ends of the spectrum. Our quarrel lies not so much with the extremities as with the spectrum. Focusing on the dispute clause unduly narrows the scope of our inquiry. The dispute clause itself is undoubtedly a creature of contract. The clause, however, is but one creature in the zoo of government contracting. To compare the nature of the triggering event of government contract dispute resolution, a purely contractual clause, with the nature of the entire process is to compare appaloosas and orangutans.

III. BANKRUPTCY

Before investigating the overlap between bankruptcy and government contract dispute resolution we must briefly examine the great American institution of bankruptcy.

Bankruptcy serves a role in corporate life eerily similar to that of the doctrine of reincarnation in some eastern religions. Bankruptcy is the belief that the souls of a corporate entity, the equityholders, do not just vanish when their corporeal form dies. Rather, they learn from the mistakes of a previous incarnation and can once again live on the earth in corporate form. True, they may suffer for the sins of previous incarnations and have trouble raising venture capital, but such is the karmic burden. With luck, some day a corporation may achieve enlightenment and reach a plane of eternal bliss and nirvana—the Fortune 500.

Though the relatives of a departed soul may receive intellectual comfort at the thought of reincarnation, they are often more touched by the pain and immediacy of their personal loss. Just as it is in life, so it is in bankruptcy. The close cousins of the equityholders, the debtholders, take little spiritual comfort from the knowledge that the equityholders may someday be reincorporated. Instead, they are more aware of the anguish of their personal loss, the money they loaned the deceased corporation.

It is at this point that the black robed judge steps in as the saffron robed monk and comforter. Perhaps the corporation has left behind some small amount of worldly goods, some trinkets to remind the debtholders of their friendship with the departed. Ah, but how to divide the estate so that everyone can have some little item of memorabilia?

This is a question of great spiritual and temporal import. Fortunately, the sacred writings can provide guidance and inspiration. It is written in United States Code, vol-

ume 11, section 11, (1976), that bankruptcy judges have great latitude in comforting those left behind. These words, like any sacred writings, may be read in different ways by different people. Happily, we have an authoritative exegesis to guide us in our interpretation.

> Among the granted powers [of bankruptcy judges] are the allowance and disallowance of claims; the collection and distribution of the estates of bankrupts and the determination of controversies in relation thereto; the rejection in whole or in part "according to the equities of the case" of claims previously allowed; and the entering of such judgments "as may be necessary for the enforcement of the provisions" of the act. *In such respects the jurisdiction of the bankruptcy court is exclusive of all other courts.*"

Pepper v. Litton, 308 U.S. 295, 304, 60 S.Ct. 238, 244, 84 L.Ed. 281 (1939) (emphasis added, footnotes omitted).

IV. WHEN WORLDS COLLIDE

We have been presented with two inclusive, exclusive, sweeping schemes, both of which the Supreme Court has endorsed. The disputes clause is something that *no court* can disregard. Bankruptcy courts have jurisdiction exclusive of *all other courts*. Given such conflicting mandates, what is a poor circuit judge to do?

The standard statement of the rule regarding a bankruptcy court's summary jurisdiction to liquidate claims is that bankruptcy judges may, in their discretion, defer a claim to another tribunal for liquidation. *See, e.g.*, 11 U.S.C. § 93(d) (1976) (allowing bankruptcy court to

specify manner of liquidation of unliquidated claims); 3 *Collier on Bankruptcy* ¶ 57.15[3.2] (14th ed. 1977). In resolving whether the bankruptcy court below properly exercised its jurisdiction, we shall make a three-stage inquiry. First, we will consider what it means to say that the resolution of a question is discretionary. Second, we will examine the guidance given us by three Supreme Court decisions on exercise of bankruptcy jurisdiction. Third, we will mediate between the ASBCA and bankruptcy court.

A. *On the Nature of Discretion*

> The discretion of a judge is said by Lord Camden to be the law of tyrants; it is always unknown, it is different in different men; it is casual, and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable.

1 J. Bouvier, *Bouvier's Law Dictionary* 885 (F. Rawle ed. 1914).

Fortunately, this rather bleak view is not the only insight we have into the nature of discretion. Chief Justice Marshall said on this subject:

> Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law and will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will

> of the legislature; or, in other words, to the will of the law.

Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 740, 866, 6 L.Ed. 204 (1824).

Marshall's is a much more helpful concept of discretion. Discretion does not imply complete freedom to choose a decision, but rather an area of the law that has not matured enough to provide a rule of decision. Within an area of discretion, as yet uncluttered by particular rules, a judge is charged with determining what decision is dictated by more general rules of law.

Holding that a type of decision is subject to discretion is not necessarily an eternal statement of the law, but rather a comment on the state of the law at that time. What was once a virgin terrain of discretion may become spotted with landmarks of rules as decisions are made. "The life of the law has not been logic; it has been experience." O. Holmes, *The Common Law* 5 (M. Howe ed. 1968). As experience with an area of the law develops, what was once discretionary may become restricted by a general rule, then qualified by exceptions, and then littered with exceptions to the exceptions. Discretion in areas of the law existing due to those areas' immaturity we shall call "discretion by default."

This progress from discretion to rule is not inevitable, however, in some cases, as courts gain experience with an area of the law, they may decide it is inappropriate to govern that area by rules. It is the nature of a rule to prescribe a uniform treatment for a class of cases; for such a rule to be useful the class of cases must share enough salient characteristics to justify being treated as

a group.[4] If an area of the law is too fact-specific, if the cases do not share enough important characteristics, it would be pointless to have a rule and the courts then may affirmatively decide to leave that area permanently to discretion. This kind of discretion we shall call "discretion by choice."

Thus, in reviewing an exercise of discretion, we must always ask an antecedent question: Is this decision truly discretionary? In the particular field of jurisdiction of a bankruptcy court to decide collateral questions, we find some narrowing of the area of discretion in three Supreme Court decisions.

B. *Supreme Court Balancing*

On three occasions the Supreme Court has held that bankruptcy jurisdiction should yield to the expertise of an administrative tribunal. In *Order of Railway Conductors v. Pitney,* 326 U.S. 561, 66 S.Ct. 322, 90 L.Ed. 318 (1946), the Court held that a railroad reorganization court should not have decided a dispute between two rival unions regarding which union had the right to conduct trains of the bankrupt inside and outside railroad yards. The Court in part relied on the Railway Labor Act, 45 U.S.C. §§ 151-188, which gave the Railway Labor Adjustment Board jurisdiction over such controversies.

Smith v. Hoboken Railroad Co., 328 U.S. 123, 66 S.Ct. 947, 90 L.Ed. 1123 (1946), held that the re-

4. There is an extensive body of literature dealing in detail with the subject of when a rule of decision is needed. *See, e.g.,* Brock, *Recent Work in Utilitarianism,* 10 Am. Phil. Q. 241, 253-61 (1973). This overly simplistic statement is adequate for our purposes.

organization court should have deferred to the Interstate Commerce Commission for it to decide whether a bankrupt railroad had forfeited its right to leased tracks. Again, the Court relied on statutory enactments. Section 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18) provided that no railroad shall abandon its track without first obtaining a certificate of public convenience and necessity from the Commission. Furthermore, section 77 of the Bankruptcy Act, 11 U.S.C. § 205, "leaves no doubt that Congress did not mean to grant to the district courts [in bankruptcy] the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates." *Smith, supra,* 328 U.S. at 133 n. 5, 66 S.Ct. at 953 n. 5 (quoting *Palmer v. Massachusetts,* 308 U.S. 79, 87, 60 S.Ct. 34, 38, 84 L.Ed. 93 (1939)).

Most recently, though not very recently, in *Nathanson v. NLRB,* 344 U.S. 25, 73 S.Ct. 80, 97 L.Ed. 23 (1952), the Court held that the bankruptcy court must defer to the NLRB for liquidation of unfair labor practice claims. The NLRB had found the employer guilty of unfair labor practices and ordered payment of back wages. While an action to enforce the order was pending in the court of appeals, an involuntary bankruptcy petition was filed against the employer. The court of appeals subsequently enforced the NLRB order and the NLRB filed a claim in bankruptcy. The bankruptcy court denied the claim and the Supreme Court reversed on the following rationale:

> The bankruptcy court normally supervises the liquidation of claims. But the rule is not inexorable. A sound discretion may indicate that a particular con-

> troversy should be remitted to another tribunal for litigation. And where the matter in controversy has been entrusted by Congress to an administrative agency, the bankruptcy court normally should stay its hand pending an administrative decision. . . . It is the Board, not the referee in bankruptcy nor the court, that has been entrusted by Congress with authority to determine what measures will remedy unfair labor practices.

Id. at 30, 73 S.Ct. at 83 (citations omitted). Now we must decide how these three decisions suggest that we mediate the conflict between the ASBCA and bankruptcy court.

C. *Bankruptcy Court v. ASBCA*

Finally we have the necessary predicate to mediate between the bankruptcy court and the ASBCA. We have some basic understanding of the nature of the two institutions, we know a little better what it means to say that a bankruptcy court may, in its discretion, allow another court to liquidate claims, and we know of three occasions where the Supreme Court has held that a bankruptcy court should have deferred.

The bankruptcy court below made detailed findings to support its determination that it should not defer. If the question facing us today were simply whether the bankruptcy court abused its discretion in making that determination, we would clearly have to hold that it did not; the bankruptcy court's decision was neither arbitrary nor capricious, but rather deliberate and reasoned. We do, however, have an antecedent question: Was this decision a truly discretionary decision? Was this discretion by choice?

1. *The Supreme Court Trilogy*—The first inquiry in determining whether the decision was truly discretionary is to determine whether the trilogy of Supreme Court cases discussed above has enunciated a rule of decision controlling the present case. The parties to the present case viewed these three Supreme Court cases as holding essentially that when *Congress* has committed a type of decision to a specialized tribunal, a bankruptcy court should defer. This view of the three cases explains why the parties disagreed so sharply over the characterization of the ASPRs, the disputes clause, and the ASBCA as being creatures of Congress or the product of a private law contractual agreement. If the mechanisms of government dispute resolution are congressionally created, the case lies within the rule of the trilogy of Supreme Court cases, and not within the bankruptcy judge's discretion.

In discussing the mechanisms of governmental contract dispute resolution, *supra* Part II, we found that they were not congressionally mandated. Thus, we do not view this case as being within the rule of the trilogy of Supreme Court cases.

2. *Time for a Rule.*—Gary would have us read these three Supreme Court cases as also standing for their negative pregnant—if Congress has not specificaly committed a particular class of disputes exclusively to a specialized agency, then those disputes are within the free discretion of the bankruptcy court to adjudicate. As we discussed earlier, a decision may be discretionary for two reasons. It may be discretionary because the field has not matured enough for there to be rules governing everything—discretion by default—or it may be discretionary because of an affirmative judgment that it is

not amenable to a rule—discretion by choice. It is our view that the three Supreme Court cases do not represent an affirmative judgment that cases are permanently committed to discretion by choice unless they are committed by Congress exclusively to a specialized tribunal. And so we must now decide whether liquidation of a government contract claim should be given over to discretion by choice.

Congress initially gave over to discretion the question of whether a bankruptcy judge should defer to another tribunal for resolution of a particular issue. This discretion is not unguided, however; it has both latitudinal and longitudinal dimension. It is neither cosmic nor omniscient, but rather discretion guided by "the will of the law." In determining the will of the law, we are guided by the broad principles of bankruptcy. The three Supreme Court cases represent a judgment that in a particular class of disputes, judgments committed by Congress to the exclusive expertise of an administrative body, the broad principles of bankruptcy would consistently lead to one particular decision, *i.e.*, the bankruptcy court should defer. Thus that formerly discretionary question was an appropriate subject for a rule of decision. We are now faced with a similar question: Should there be a jurisdictional rule regarding government contract disputes before the ASBCA?

To determine whether a rule is appropriate, we must look to the nature of the two processes involved. The primary purpose of a proceeding in bankruptcy is to ensure that all creditors are treated fairly.[5] This primary

5. It is the purpose of the Bankruptcy Act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive

purpose makes it absolutely essential that all claims be *satisfied* in one forum. The ancillary jurisdiction of a bankruptcy court to liquidate claims, however, involves more nearly the administrative convenience of settling all disputes in a single forum; it just is not as vital to the purpose of bankruptcy. So, for example, we are told that in proper circumstances bankruptcy courts should defer unsettled questions of state law to state courts. *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 483, 60 S.Ct. 628, 630, 84 L.Ed. 876 (1940). *See also First State Bank and Trust Co. v. Sand Springs State Bank*, 528 F.2d 350, 354 (10th Cir. 1976) ("Bankruptcy courts should be reluctant to entertain questions which may be equally well resolved elsewhere."). Furthermore, though *Smith, Order of Railway Conductors*, and *Nathanson* do not specifically control this case, they at least can stand for the general proposition that a bankruptcy court should defer a complicated, technical dispute to a specialized forum.

Given these generalized ideas about a bankruptcy court's ancillary jurisdiction, we must now investigate whether they justify articulating a general rule for resolution of government contract disputes pending before a Board of Contract Appeals. First, allowing a Board of Contract Appeals to liquidate claims arising out of a government contract would not impair the primary goal of bankruptcy—requiring satisfaction of all claims against the bankrupt's estate proceed in a central forum; once the Board of Contract Appeals liquidated the claim, the government would look to the bankruptcy court for satis-

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indebtedness and permit him to start fresh free from the obligations and responsibilities consequent upon business misfortunes. *Williams v. United States Fidelity & Guaranty Co.*, 236 U.S. 549, 554-55, 35 S.Ct. 289, 290, 59 L.Ed. 713 (1915).

faction. Second, government contracting law tends to be technical and esoteric. For example, the trial below took eight months and generated a 17,000 page transcript. The findings of fact constitute a moderate-sized book in themselves. Third, there are specialized fora designed specifically to resolve government contract disputes. Boards of Contract Appeals were created precisely because of the needs for expertise, speed, and uniformity in resolving government contract disputes. One cannot help but think that the ASBCA might have been better qualified by its experience and expertise to resolve the present case than was a bankruptcy judge who was at one stroke forced to master government contracting law. Fourth, government contract disputes may often have claims running against the government in addition to claims against the contractor. Resolution of the claims against the government is in the exclusive jurisdiction of the Court of Claims; thus, if a bankruptcy court did not defer to the Board of Contract Appeals, the same basic contract dispute might have to be tried twice.[6]

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6. This potential problem is illustrated quite nicely by this case. The bankruptcy court here affirmatively valued Gary's claim against the government, ostensibly to determine whether the government's claim against Gary was entitled to priority. Gary then attempted to use that "collateral" valuation of Gary's claim to support a claim for damages in the Court of Claims.

In that proceeding the government successfully argued that the claim against the government should be remanded to the ASBCA for administrative exhaustion. *Gary Aircraft Corporation v. United States*, No. 407-80C (Ct. Cl. Jan. 9, 1981). Before us the government argues that the bankruptcy court's findings were beyond its jurisdiction, relying on *United States v. Shaw*, 309 U.S. 495, 60 S.Ct. 659, 84 L.Ed. 888 (1940), and *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940).

We do not pass on the merits of this argument. We mention the issue now solely to point out that the considerable time and energy spent already on this jurisdictional question could all have been saved had the bankruptcy court deferred.

Finally, though the Board of Contract Appeals were not specifically created by Congress, Congress certainly was aware of them and has endorsed them in the Wunderlich Act and the newly enacted Contract Disputes Act of 1978.

In summary, this does seem to be an area where a rule of decision would be proper. The various factors we have just discussed seem common to most, if not all, government contract disputes normally heard before Boards of Contract Appeals. This common nature is the key indicator for whether a rule or discretion by choice is appropriate; given these common factors, a rule for deferral is appropriate. We hold that a bankruptcy court should defer liquidation of a government contracting dispute to the Board of Contract Appeals.[7]

CONCLUSION

A judge is more a philosopher than a scientist, a mechanic, or a builder. But the philosophy a judge expounds in his or her judicial expostulations has as its foundation the materials furnished by those more technical and empirical disciplines. De novo determinations of technical questions by judges are on the wane, and that is all for the good. That is not to say, however, that

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7. 11 U.S.C. § 93(d) (1976) provides that unliquidated claims "shall not be allowed if the court shall determine . . . that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this title." Certainly the rule we announce today requiring liquidation in the Board of Contract Appeals cannot be used per se to support a finding of undue delay, the normal tests for delay would still apply. *See, e.g., Schaefer v. Smith*, 469 F.2d 1256, 1258 (10th Cir. 1972) ("In an appropriate case a one year period could very possibly 'unduly delay the administration of the estate.' Under other circumstances, however, when considered with all other factors, a contingent claim should not be disallowed solely on the basis of administrative delay."). In this case, considering all factors, deferring to the ASBCA should not cause undue delay.

a judge should sit in cloistered chambers and make decisions far removed from the mechanical details giving rise to the issue at hand.

Accounting for the mechanical details, however, presents its own problems. No individual, no matter how robed, can be a renaissance person in this modern, complex society. And a judge therefore cannot be prepared to tackle the mundane and the celestial, the orbital and the suborbital, the oceanographic and the subterranean with the facility that might have been possible centuries ago. We are living in an age and era of specialization, with no end in sight, save perhaps a fiery holocaust where all knowledge and experience would be obliterated. The judicial philosophers have not been immune from this specialization, and the different cloisters may now house different orders with different vows and specialties.

These juridical turfdoms are not easily geodisized or surveyed for a metes and bounds description of their rights, powers, and duties. Bankruptcy and government contract dispute resolution are both institutions to be treated with great respect and deference. The life of judges would be easier if institutions such as these never came into conflict. When they do, we must mediate between them in the manner that least impairs their respective goals and purposes.

We read much today in the press and in the reported decisions and in the commentaries about the role of the bankruptcy judges in the jurisprudential cosmos in which we dwell. There are unanswered questions remaining, to be sure, but it can be said with some degree of certainty that a corporation or individual entering into the pale of bankruptcy does not relegate all other governmental

agencies, regardless of their powers, strengths, and histories, to the back burner, without even permitting the stove to be lit. We searched the statutes and legislative history and can reach no absolute certitude, but in viewing the problems presented by this case it seems to us that it would be a misreading of our developing jurisprudence to believe that a bankruptcy court should be vested with nigh-unreviewable discretion to adjudicate highly esoteric and technical claims not subject to a purely jurisprudential solution.

Whether such discretion is to be exercised is a matter of law, almost pure law. The methodology of the exercise of discretion is brought to the judge, freighted and burdened by very high level principles of law. We are here dealing with a model form of deference because the forum to which the adjudication is initially assigned is technically equipped and experienced in the field to such an extent that it can make the job of a bankruptcy judge making ultimate determinations regarding the debtor easier, with greater harmony and symmetry within the existing body of government contracting law.

We would not dream of giving the Board of Contract Appeals the broad equitable jurisdiction given to the bankruptcy court, merely because the bankrupt was a party to a government contract. By similar logic, we see no reason to give to the bankruptcy court the determination of the existence of a claim and its valuation when that is within the peculiar expertise of the Board of Contract Appeals. This may be especially true when the sole significant asset of the debtor is a claim against the government, which *must* pass through the Board of Contract Appeals and Court of Claims. We need a narrow

turf and a legal tightrope walker to determine the validity and magnitude of the contract claims, if any. Assuming there be such, we may then return to bankruptcy turf to see if reorganization is to be found in the grass.

Accordingly, we reverse the ruling of the bankruptcy court on the government's motion for stay, and remand this case to the bankruptcy court with instructions to stay further action on the claim of the United States pending proceedings in the Armed Services Board of Contract Appeals.

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CAUSE NO. SA-79-CA-342

(Filed June 24, 1981)

IN RE
GARY AIRCRAFT CORPORATION,
Debtor.

Appeal From The Judgment of the United States Bankruptcy Court For The Western District of Texas on the Contested Matter Respecting Objection to Claim of The United States of America in Cause No. SA-76-BK-443

MEMORANDUM OPINION AND ORDER

CAME ON TO BE HEARD the Appeal of the United States of America from the Judgment of the United States Bankruptcy Court for the Western District of Texas, the Honorable Bert W. Thompson, Bankruptcy Judge, on the Contested Matter Respecting Objection to the Claim of the United States of America, Cause No. SA-76-BK-443, entered June 29, 1979. Appellant filed its brief on November 21, 1979. Appellees Gary Aircraft Corporation and the Official Creditors Committee filed a joint brief on March 5, 1980, which was replied to by Appellant's brief of April 28, 1980. The Court, having carefully considered the record, the Findings of Fact and Conclusions of Law

of the United States Bankruptcy Court, and the arguments and authorizaties of the parties, enters the following Memorandum Opinion and Order.

Gary Aircraft Corporation entered into contract F41608-71-D-0289 (hereinafter contract -0289) with the United States Air Force effective December 1, 1970 to rebuild Model R2800 aircraft engines. Contract -0289 expired, after extensions, on August 31, 1974. Under the contract, Gary was supplied with materials from various Government sources. Beginning in late 1973, serious questions were raised by the Government Accounting Office (GAO) about Gary's property control systems. However, in the summer of 1974, Gary was awarded a new contract, No. F41608-74-D-1645 (hereinafter contract -1645) to continue performing the same services, effective September 1, 1974. Meanwhile, the GAO investigation continued and in August, 1974, GAO recommended that the Air Force take drastic action against Gary to protect Government interests. A fifty person "surveillance team" was sent to Gary's plant which imposed much more stringent property and quality control requirements. As a result, production was severely disrupted and completely halted at some times. Gary was unable to meet its delivery schedules. The Government terminated the contract for default in March of 1975.

In 1975 Gary pressed claims against the Government through administrative channels for termination and changes ordered by the "surveillance team." The Government asserted claims against Gary for excess reprocurement costs and unaccounted for government property. On October 28, 1976, Gary filed this Chapter XI bankruptcy proceeding. On November 30, 1976, the Govern-

ment filed its proof of claim in the bankruptcy proceeding, including its claim on contracts -0289 and -1645. Gary moved to disallow the claim, and the Official Creditors' Committee supported Gary. Hearing was set for July 18, 1977. The Government moved that the hearing be stayed or vacated pending liquidation of the claims and counterclaims by the Armed Services Board of Contract Appeals. That motion was heard July 18, 1977, and finally denied on February 22, 1979. The hearing commenced July 19, 1977 and continued for approximately eight months. The record consists of a seventeen thousand page transcript and exhibits of similar gravity. On June 29, 1979, the Bankruptcy Court essentially adopted Gary's proferred 1,107 Findings of Fact and Conclusions of Law, covering 383 pages. The Bankruptcy Court found generally that the alleged defaults were caused by the Government. Therefore, the termination for default was converted to one for the convenience of the Government, absolving Gary of liability for reprocurement costs and making the Government liable for Gary's losses. The Government's claim against Gary for lost parts was valued at $26,049.83 (F. 911, 1081).[1] Gary's claim against the Government was valued at not less than $3,337,990.00 (F. 1069-70, 1084).

The Government urges that the Bankruptcy Court erred in:

1. Denying the Government's Motion to Stay and Vacate, and proceeding to the merits of the claims and counterclaims;

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1. The Court adopts the abbreviations used by the parties: "MF" for findings of the Bankruptcy Court on the Motion to Stay and "F" for Findings of Fact and Conclusions of Law on Claim of the United States of America.

2. Disallowing portions of the Government's claim for unaccounted for servicable government-furnished property;
3. Determining the fair market value of the unaccounted for serviceable government-furnished property;
4. Precisely valuing Gary's affirmative claim against the Government; and
5. Determining the nature and value of Gary's claim against the Government.

I.

The threshold question in this case is whether the Bankruptcy Court had jurisdiction to adjudicate the merits of these claims. The contracts in question were subject to the "standard" disputes clause present in all government procurement contracts, providing that all disputes would be presented to and decided by the Government's contracting officer. Appeal therefrom was to the Armed Services Board of Contract Appeals (hereinafter ASBCA). The Supreme Court has stated that this clause,

> is something more than a dead letter to be revived only at the convenience or discretion of the contractor. It is a clear, unambiguous provision applicable at all times and binding on all parties to the contract. No court is justified in disregarding its letter or spirit. . . . This mechanism, moreover, is exclusive in nature. Solely through its operation may claims be made and adjudicated as to matters arising under the contract.

United States v. Joseph A. Holpuch Co., 328 U.S. 234, 239-240, 66 S.Ct. 1000, 1003, 90 L.Ed. 1192 (1946)

(citations omitted). On the other hand, the jurisdiction of bankruptcy courts has been described just as sweepingly:

> Courts of bankruptcy are constituted by Sections 1 and 2 of the bankruptcy act 30 Stat. 544, 11 U.S.C. Sections 1(8), 11, and by the latter section are invested "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings." Consequently this Court has held that for many purposes "courts of bankruptcy are essentially courts of equity, and their proceedings are inherently proceedings in equity". . . . Among the granted powers are the allowance and disallowance of claims; the collection and distribution of the estates of bankrupts and the determinations of controversies in relation thereto; the rejection in whole or in part "according to the equities of the case" of claims previously allowed; and the entering of such judgments "as may be necessary for the enforcement of the provisions of the act. In such respects the jurisdiction of the bankruptcy court is exclusive of all other courts.

Pepper v. Litton, 308 U.S. 295, 303-304, 60 S.Ct. 238, 244, 84 L.Ed. 281 (1939) (citations omitted). The Court has on at least three occasions opined that the jurisdiction of a bankruptcy court is subservient to that of an administrative tribunal. In *Order of Railway Conductors of America v. Pitney,* 326 U.S. 561, 66 S.Ct. 322, 90 L.Ed. 318 (1946), the Court held that a railroad reorganization court should not have adjudicated a controversy between rival unions as to which union's members had the right to conduct trains of the bankrupt railroad over tracks inside and outside of the railroad yards. The Court noted that Congress had specifically designated the Railway Labor Adjustment Board to adjudicate such con-

troversies, by means of the Railway Labor Act, 45 U.S.C. Sections 151 et seq. Likewise, the Court ruled in *Smith v. Hoboken Railroad Co.,* 328 U.S. 123, 66 S.Ct. 947 90 L.Ed. 1123 (1946) that the reorganization court should have deferred to the Interstate Commerce Commission as to whether a bankrupt railroad had forfeited its rights to leased tracks. The Court specifically noted that, in light of Section 77 of the Interstate Commerce Act, 49 U.S.C. Section 1 et seq., there was "no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates." 328 U.S. at 133 n.5, 66 S.Ct. at 953 n.5. Neither *Order of Railway Conductors* nor *Smith* involved monetary claims against the bankrupt estates, and both involved the special railroad bankruptcy situation. Therefore, the Court feels that neither decision controls this case.

The most recent statement is *Nathanson v. National Labor Relations Board,* 344 U.S. 25, 73 S.Ct. 80, 97 L.Ed. 23 (1952). There, the NLRB had found the employer guilty of unfair labor practices, and ordered the payment of back wages. While an action to enforce the order was pending before the Court of Appeals, an involuntary bankruptcy petition was filed against the employer. The Court of Appeals subsequently enforced the order. The NLRB filed a proof of claim with the bankruptcy court, which denied the claim. The Supreme Court held that the claim was provable in bankruptcy, but not entitled to priority as a debt owing to the United States. The Court said:

> The bankruptcy court normally supervises the liquidation of claims. But the rule is not inexorable. A

> sound discretion may indicate that a particular controversy should be remitted to another tribunal for litigation. And where the matter in controversy has been entrusted by Congress to an administrative agency, the bankruptcy court normally should stay its hand pending an administrative decision. . . . It is the Board, not the referee in bankruptcy nor the court, that has been entrusted by Congress with authority to determine what measures will remedy unfair labor practices.

344 U.S. at 30, 73 S.Ct. at 83-84 (citations omitted). The Court noted that the National Labor Relations Act authorized the Board, once an unfair labor practice had been found, to require the person who committed it to "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." 344 U.S. at 29, 73 S.Ct. at 83; 29 U.S.C. Section 160(c). *Nathanson* is distinguishable from this case. First, the bankruptcy court there was presented with an already liquidated claim. Here, the ASBCA hearing had not yet begun. Second, the NLRB plays a unique role in adjudicating labor disputes. Its judgment was ancillary to its determination that the employer had committed unfair labor practices. As with the esoteric, non-monetary issues involved in *Order of Railway Conductors* and *Smith,* the bankruptcy judge was in no position to make such a determination. Here, although the issues were technical and complex, the dispute was over claims for money arising out of the breakdown of a contractual relationship. This is within the traditional province of the bankruptcy court.

The Bankruptcy Court had expert testimony concerning the operations of the ASBCA that the adjudication

of the Government's claims against Gary and Gary's counterclaims against the Government could drag on for years. MF 68. This would substantially frustrate the Bankruptcy Court in discharging its duty to expeditiously rearrange, if possible, Gary's affairs.

Bankruptcy courts sit as courts of equity. *Pepper v. Litton, supra; Katchen v. Landry,* 382 U.S. 323, 327, 86 S.Ct. 467, 471, 15 L.Ed.2d 391 (1966). Their history and purpose is one of expeditiously and fairly settling the estates of distressed debtors so that creditors may receive as much as is realistically possible, circumventing, if necessary and appropriate, the strictures of rigid legalism. Even reduction of a debt to judgment does not foreclose their review. *Pepper v. Litton,* 308 U.S. at 305, 60 S.Ct. at 244. Ordinarily one who files a proof of claim with a bankruptcy court expressly invokes that court's jurisdiction and subjects himself to all the consequences thereof. *Katchen v. Landry,* 382 U.S. at 305, 86 S.Ct. at 476. Therefore, the Court is of the opinion that the Bankruptcy Court did not err or abuse its discretion in adjudicating the merits of this dispute.

II.

The Government next complains that the Bankruptcy Court erred in determining the amount of serviceable government property lost or unaccounted for by Gary. This involves interpretation of the contracts, and findings of fact. Findings of fact may be overturned by this Court only if clearly erroneous. Bankruptcy Rule 810 provides:

> Upon an appeal the district court may affirm, modify, or reverse a referee's judgment or order, or remand with instructions for further proceedings. The

> court shall accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge the credibility of the witnesses.

The Bankruptcy Judge expressly stated that the quality and expertise of Gary's witnesses, as opposed to the Government's, was "utmost in the Court's mind in reaching its decision. . . ." Decision of the Court on the Objection to the Claim of the United States, p. 3.

The claim for loss of serviceable government property, indeed this entire case, rests on Gary's inadequate records and the Government's lack of records. Under the terms of the contracts, Gary was supplied with materials necessary to rebuild the R2800 engines from various Government supply sources. The Government made no attempt to keep any centralized records of delivery of property to Gary. This practice was condemned as unsound by the Government's own investigators. See F. 684.

Therefore, to prove delivery of property, the Government had to rely on Gary's receipt records. Gary was contractually obligated to maintain adequate property control records. Unfortunately, Gary's records were riddled with errors. The Bankruptcy Court's disallowance of the majority of the Government's claims for lost serviceable property was based on a study done by accountants hired by Gary analyzing inventory shortages and overages, and trading off shortages and overages of identical or very similar parts. The Government now urges that:

1. Liability should be imposed on the basis of Gary's inability to specifically account for short-

ages by showing that specific parts indicated as received in its records and not recorded as having been used in production or found on the inventory shelves actually were used in specific production activity or redelivered to the Government;

2. The trade-off analysis arbitrarily sets off shortages and overages of identical or similar parts without any showing that the shortage and overage are related to one another, without regard for the length of time between the recorded shortages and overages, and without regard to the fact that in many cases inventories were conducted between the times of the shortage and overage which should have cleared up discrepancies;

3. Once the Government had proved a prima facie case, Gary bore the burden of proof of the affirmative defense of performance of the contractual requirement to account, not simply the burden of going forward with evidence as required by the Bankruptcy Court.

The Government submits that Gary is liable under either of two theories. The first is for direct proof of loss, as contemplated in the "risk of loss" clause of the contracts. The second is for inability to specifically account for each item received by showing either that it was used in production or returned to the Government. This second theory is said to stem from Armed Services Procurement Regulations Appendix B, which the Government claims is part of the contract with Gary. The Government does not direct the Court's attention to which portion of Appendix B purports to make inability to account rather than actual loss the basis of the contractor's liability. Paragraph B-

203, entitled "Contractor's Liability", provides in relevant part that:

> (a) Subject to the terms of the contract, the contractor may be liable when shortages of Government property are disclosed or when Government property is lost, damaged, or destroyed, or when there is evidence of unreasonable use or consumption of Government property as measured by the allowances provided for by the terms of the contract, the bill of material, or other appropriate criteria.

Thus, it appears to the Court that Appendix B, like the main text of the contract, contemplates liability for actual loss.

The Government next argues that, once it established its prima facie case of delivery of the materials to Gary, Gary bore the burden of proving redelivery, citing two ASBCA cases, *Export Packing Div. of Novo Corp.*, ASBCA Nos. 18376, 18377, 18482-18484, 75-1 BCA ¶ 11,291 (May 14, 1875) (*Export I*) and *Export Packing Div. of Novo Corp.*, ASBCA Nos. 18991-18993, 19099, 19657, 78-2 BCA ¶ 13,286 (May 31, 1978) (*Export II*). However, in *Export I*, the Board had found that the Government had proved delivery of the goods. The contractor proved sufficient security measures, giving rise to an inference that the property had been mistakenly redelivered to another government agency. The ASBCA cited *Pan-American Petroleum Transp. Co. v. Robins Dry Dock & Repair Co.*, 281 F. 97 (2nd Cir. 1922), cert. denied 259 U.S. 586 (1922) for the proposition that when a contract bailee pleads performance, it bears the burden of proof of that affirmative defense. *Export II*

simply cites the holding in *Export I*. Here, the Government's "prima facie" case consisted of introducing Gary's Inventory Adjustment Vouchers, which documented discrepancies between records of received property and property used in production or still in inventory. Gary did not plead "performance". Rather, it plead and proved to the satisfaction of the Bankruptcy Judge that the vast majority of these discrepancies existed on paper only. The Government complains that Gary's records do not tie specific overages to specific shortages. However, the Government cannot prove its "prima facie" case except by the same inaccurate records.

The Government argues that the Bankruptcy Court was too liberal in allowing setoffs of shortages and overages. The Bankruptcy Court allowed these trade-offs for any shortage and corresponding overage of a given item or very similar items that could be visually confused. See F. 834-837. In light of Gary's contractual duty to account, the Bankruptcy Court held it liable for any shortages which were not balanced by a corresponding overage. F. 837. The Government complains that the Bankruptcy Court did not require Gary to show how shortages and overages were related, improperly assuming misidentification or misrecording. Likewise, the Bankruptcy Court allowed set-offs between overages and shortages arising years apart, without regard to the fact that inventories had been taken in between. However, the Bankruptcy Court found that there had never been a wall to wall inventory of Government property in Gary's control during the periods covered by these contracts. F. 692. There was no credible evidence that any of the property shown as missing on the records had in fact been lost or converted. F. 763-810. Gary showed that it purchased suffici-

ent R2800 parts to meet the demands of its commercial customers. F. 723-727. Gary's security measures were very stringent, extending even to searching employee lunch boxes to prevent pilfering of small parts. F. 733-746. Under these circumstances, the Court cannot say that the finding of the amount of lost property based on the liberal trade-off allowances was "clearly erroneous".

III.

The Government next complains that the Bankruptcy Court erred in its determination of the fair market value of the lost serviceable property. The Bankruptcy Court was presented with evidence of two disparate markets in which R2800 engine parts are traded. The Government insists that the Foreign Military Sales (FMS) market supplies the accurate measure of fair market value. Gary proposed, and the Bankruptcy Court found, that the Surplus After-Market (SA-M) was the relevant market. The Government sells military supplies to friendly foreign governments through the FMS program. The price is fixed according to the actual acquisition cost to the Government of the item, regardless of whether the item is new or used. F. 873. The SA-M, on the other hand, consists of sales to the highest bidder of surplus government property. The prices in the two markets are widely disparate. The Bankruptcy Court found that the fair market value, as represented by sales in the SA-M, was ten percent of the acquisition cost of the item. F. 900.

The Government insists that the selection of the SA-M as the indicator of fair market value was an error of law rather than fact, being "inconsistent with the fundamental theory and principles of fair market valuation". Reply

Memorandum, p. 31. However, it appears to the Court that this was a determination made on the basis of objective facts and inferences therefrom, and is entitled to review under the clearly erroneous rule. The Government's contention that the Bankruptcy Court ignored the FMS is not true. The Bankruptcy Court rejected FMS as a determinant of fair market value only after thorough consideration. See F. 850-887.

The Bankruptcy Court had evidence before it that the FMS was significantly affected by non-market forces, especially the foreign policy priorities established by the Government. F. 875, 882. As noted above, FMS sales did not distinguish in price between new and used serviceable parts. F. 873. There was also no distinction made as to life expectancy of the materials. F. 880. Government surplus parts are worth far less on the domestic market than used commercial parts, due to their age and the number of times they have been refurbished or rebuilt. F. 885. Foreign nations participating in the FMS program are frequently prevented from buying the same items for lower costs in the SA-M under the terms of their contract with our Government. F. 886.

On the other hand, the SA-M is a highly competitive market. The Government often gets over a hundred bids, varying widely in price, for surplus property. F. 891-893. Price information is made available regularly through the Government and at least one commercial service. F. 895. The Government sold much of the property left at Gary's Victoria, Texas, plant after the contract was terminated on a "case sales" basis, at prices far lower than the FMS values now claimed. F. 865. Prices of new serviceable parts are much higher than the price of used serviceable parts in the SA-M. F. 874.

There is certainly merit in the Government's position. Property finding its way into the SA-M must first be declared surplus to the needs of the agency holding it, then offered to other government agencies and some non-profit organizations. Only then can it be sold on the SA-M. On the other hand, the Government was able to document sales of each item unaccounted for by Gary on the FMS market. Exhibits U.S. 414 and 415. The prices seem high for used parts; yet, subject to some coercion referred to above (F. 886), they were purchased by willing buyers. The Court agrees with the Government that some factors relied on by the Bankruptcy Court in rejecting the FMS market, *e.g.*, the lack of price negotiations, the fact that some sales are on credit, etc., are not particularly probative of the inappropriateness of relying on that market. However, it is clear to the Court that many of the prices obtained on the FMS are unrealistically high. The contention that items used for years and refurbished and rebuilt over and over again are worth the same as new parts is contradicted by common knowledge and direct expert testimony. See F. 885. Gary's proof of fair market value by way of SA-M valuations does not strike the Court as compelling. However, there is evidence to support it, and the Court, having considered the Findings of the Bankruptcy Court on fair market value as well as the defects in those Findings argued by the Government, is not "left with the definite and firm conviction that a mistake has been committed". *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

IV.

The Government next argues that the Bankruptcy Court erred in proceeding to precisely value Gary's claim

against the Government. All parties and the Bankruptcy Court agree that the Bankruptcy Court had no jurisdiction to render an affirmative judgment against the Government, and no such award was made. However, the Government agrees that it was necessary for the Bankruptcy Court to determine whether Gary was insolvent, and thus whether the claim of the Government was entitled priority. The Government further agrees that the resolution of the conflicting claims of Gary and the Government was necessary to determine whether Gary was insolvent. It was stipulated that Gary's liabilities, exclusive of any debt owing the Government, totalled $4,771,592.72. F. 1080. It was further stipulated that Gary's assets, exclusive of any claim against the Government, totalled $4,275,373.82. F. 1083. The Government argues that, once the Bankruptcy Court had determined that Gary's liability to the Government was only $26,049.83, the Bankruptcy Court only needed to determine that the value of Gary's claim was not less than $555,284.96 in order to find Gary solvent.

In fact, the Bankruptcy Court did not purport to precisely value Gary's claims against the Government, but rather found that the Government's liability to Gary was not less than $3,337,990.00. F. 1084. The Bankruptcy Court noted that the Government's proof of claim had been in the amount of $2,686,114.15. F. 1102. The Bankruptcy Court reasoned that, considering the possibility of modification of its partial allowance on appeal, it would be in the interest of judicial economy to make the findings referred to above. The Government has cited no authority for its contention that the Bankruptcy Court should not have valued the Government's claim as it did. This Court declines to condemn that practice.

V.

Finally, the Government complains of the Bankruptcy Court's characterization and valuation of Gary's affirmative claim against it. The Government submits that:

1. The court erred in treating the entire claim as a termination for convenience claim when substantial portions were for a constructive change order;
2. The court erred in applying a total cost approach rather than an inventory basis approach in valuing the claim.
3. The court erred in its evaluation of Gary's cost accounting system;
4. The court erred in its construction of the cost accounting clause of contract -1645;
5. The court erred in finding that Gary had complied with the Cost Accounting Standards at 4 C.F.R. 401 and 405;
6. The court erred in failing to require segregation of costs between the two contracts; and
7. The court erred in determining numerous elements of damages for which it allowed Gary to recover.

The constructive change order costs arise out of the activities of the 50 person "surveillance team" sent by the General Accounting Office to monitor Gary's operations in August of 1974. The Bankruptcy Court found that this team unreasonably imposed higher quality control standards and intruded into the operations of the Gary plant to the extent that operations were severely hampered and at one point completely shut down. See F. 170-247. The Government's own auditors had found that Gary's records

would not permit segregation of the constructive change order costs from termination costs. F. 939, 941.[2] The Bankruptcy Court had before it expert testimony that inclusion of a changes claim in a termination proposal was common practice accepted by contractors and the Government. F. 940. ASPR Section 8-307.1(b) requires a terminated contractor to promptly submit a settlement proposal including all his claims, which by its literal terms would appear to require inclusion of change order claims. See F. 943. The Government nonetheless argues that, on the facts of this case, inclusion was improper. It cites *Okaw Industries, Inc.*, ASBCA Nos. 17863, 17864, 77-2 BCA ¶ 12,793, which was actually cited by the Bankruptcy Court in support of its inclusion of changes cost within the termination claim. F. 943. There the Government had argued that certain start-up costs should be disallowed because not previously submitted in a separate changes claim. The Board allowed the costs because the Government had not demonstrated prejudice. 77-2 BCA ¶ 12,793 at p. 62,227. The Government also cites *Celesco Industries, Inc.*, ASBCA Nos. 21928, 22460 (apparently unreported) where the Board refused to consider the claims together. However, the Court is of the opinion that, in light of the Bankruptcy Court's findings and the extraordinary nature of the constructive change order in this case, consideration of change order costs with termination costs is appropriate.

Under ASPR Section 8-307.2, termination settlement proposals may be submitted under either the "inventory basis" or the "total cost basis". The inventory basis requires the contractor to allocate labor, overhead, materials

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2. Finding 941 was erroneously numbered 944 in the Bankruptcy Court opinion.

and general administrative costs to individual items of inventory left as of the date of termination. Under the total cost method, all labor, overhead, materials and general and administrative expenses are totalled, and all receipts from the Government are subtracted from the total. The inventory basis is preferred; however, the total cost basis may be used "when use of the inventory basis is not practicable or will unduly delay settlement". *Id.* Resort to the total cost basis may be justified where, "the contractor's accounting system will not readily lend itself to the establishment of unit costs for work in process and finished products." ASPR Section 8-307.2(b)(1)(ii). The Bankruptcy Court found that Gary's records would not supply the necessary information, and proceeded on the total cost basis. F. 921. Properly applied, the total cost basis will yield the same result as the inventory basis. See F. 920.

The courts and the Armed Services Board of Contract Appeals have been somewhat more cautious in applying the total cost approach to change order valuations. The Court of Claims has enumerated four prerequisites:

> The acceptability of this method hinges on proof that (1) the nature of the particular losses make it impossible or highly impracticable to determine them with a reasonable degree of accuracy; (2) the plaintiff's bid or estimate was realistic; (3) its actual costs were reasonable; and (4) it was not responsible for the added expenses.

WRB Corporation v. United States, 183 Ct.Cl. 409, 426 (1968). See also *Meva Corp. v. United States,* 511 F.2d 548, 206 Ct.Cl. 203 (1975); *Moorehead Construction Co. v. City of Grand Forks,* 508 F.2d 1008 (8th Cir.

1975); *Fattore Cor. v. Metropolitan Sewerage Commission of the County of Milwaukee,* 505 F.2d 1 (7th Cir. 1974). Gary's claim under contract -0289 was solely for constructive change orders. The Bankruptcy Court found that the *WRB* four part test was satisfied. F. 1063-1067. The Government has not challenged these findings. The claim under contract -1645 is for termination, with substantial portions resulting from the constructive change order. The Bankruptcy Court justified its invocation of the total cost approach primarily by its finding that use of the inventory basis was not practicable due to the nature of Gary's accounting system, satisfying ASPR Section 8-307.2. F. 923. Although the Bankruptcy Court considered the propriety of considering the changes element of the claim under contract -1645 along with the termination element, it did not consider the effect of that inclusion on the propriety of valuation by the total cost method. The only case cited to the Court which is directly on point is *Sternberger v. United States,* 401 F.2d 1012, 185 Ct.Cl. 528 (1968), where the Court of Claims upheld the ASBCA's refusal to apply the total cost approach to a termination claim containing a substantial changes claim. The Court set forth the *WRB* test, but relied primarily on the weakness of the contractor's evidence on the amount of costs. 401 F.2d at 1015-1016.

This Court is of the opinion that, under the extraordinary circumstances of this case, the total cost basis was properly applied to the entire termination claim. The Bankruptcy Court found that Gary had been performing satisfactory work under its contracts. F. 17-24. It found that the GAO investigation of Gary was conducted under questionable professional standards. F. 121-126. The result was that Gary was invaded by the fifty member "sur-

veillance team" which unreasonably ordered changes in various production and administrative procedures and imposed drastically higher quality control standards, bringing production to a virtual halt. F. 170-247. Throughout the period of disruption, the various Government agencies were secretly intending to terminate Gary's contract for default. To that end, they imposed unnecessarily high production quotas which could not be met because of the activities of the surveillance team. Government agents exhorted Gary to continue to spend money trying to get production back to capacity when they knew that the Government's need for the R2800 engines had been drastically reduced and that Gary was about to be terminated. F. 273-312, 367-370. The Bankruptcy Court found that the Government actions were the cause of the delays and disruptions that led to the changes costs. F. 364-365.

A termination for convenience of a contract comprising a major portion of the contractor's business has a devastating impact on that business. The contractor loses employees, good will and reputation in the community. This is even more true where the termination is ostensibly for default, amid charges of impropriety, poor quality and gross inefficiency. Here, Gary Aircraft Corporation, a profitable and well-respected business until the events giving rise to the claims adjudicated by the Brankruptcy Court, was driven to the brink of bankruptcy and hundreds of workers became unemployed. F. 5-8, 916. The Government agencies knew when they committed these acts that Gary's accounting system would be incapable of substantiating its claims on an inventory basis. F. 927-928. Gary cannot be made whole for its losses except by valuation on the total cost basis.

Alternatively, the Court notes that the Bankruptcy Court did make findings from which it can be inferred that the requirements of *WRB, supra,* were substantially met. Since Gary employed a "process cost" accounting system, whereby costs were maintained as to major work processes rather than individual engines, the cost of plant-wide delays and disruptions could not be ascertained on an inventory basis. F. 921, 1063. Gary's bid on contract -1645 was reasonable and allowed for profit. F. 1038, 1040. The new quality control requirements imposed by the surveillance team were "by far the predominant factor" causing production delay and disruption. F. 364. Shortages of government-furnished property (GFP) and/or stringent property control requirements, also attributable to the Government, exacerbated the situation. F. 364-365. Finally, although the Bankruptcy Court did not find each expenditure to be reasonable, it made extensive findings concerning costs and considered and rejected Government arguments of unreasonableness as to some items. F. 970-1054.

The Government argues that the Bankruptcy Court's findings that Gary's accounting system would not yield inventory basis data confused the concept of the system itself with that of the maintenance of the system. It points to the testimony of two Government witnesses that, properly maintained, Gary's accounting system would have provided data to segregate costs between contracts -0289 and -1645. However, the Bankruptcy Court found that the contracts did not necessarily require segregation of costs during the short overlap period where some work was being done on each contract. F. 924. The testimony referred to by the Government is contradicted by at least one Government audit. F. 934. Moreover, segregation of

costs by contract still would not permit valuation on an inventory basis. The Government also notes testimony of a Gary accountant that if Gary employees had maintained work order cards properly, it would have been possible to allocate costs between engine overhaul work and certain extra work. This still would not supply inventory basis data. Nothing is before the Court to indicate that the valuation would be more accurate or sound from an accounting standpoint if the work done in the overlap period had been strictly segregated or if engine overhaul work could be accurately segregated from extra work.

The Government further urges that the Bankruptcy Court erred in determining that more extra work was certain to be ordered. F. 946. This was only one of several findings supporting the Bankruptcy Court's judgment that Gary's claim was not limited by the total contract price. F. 944-946. The Bankruptcy Court had evidence that the Government had ordered extra work during performance of the two contracts. Its judgment that the Government would continue to do so is not clearly erroneous.

The Government takes issue with the Bankruptcy Court's finding that it had waived compliance by Gary with the cost accounting clause of contract -1645, Clause J-21. F. 927. This was alternative to the Bankruptcy Court's findings that Gary was in compliance with at least one permissible interpretation of the clause and that the clause did not require an accounting system which would have allowed submittal of Gary's claims on an inventory basis. F. 924, 925. Clause J-21 provides in relevant part that:

> (a) The Contractor shall maintain a cost accounting system which shall be controlled by, or be fully and readily reconcilable with, the general or financial accounting system; reports resulting therefrom must be accurate and prompt (available not more than three weeks after the end of each month, with the annual report available not more than two and one half months following the close of the Contractor's fiscal year); and the several shop activities must be clearly and accurately separated. The cost accounting system must be capable of providing accurate information from which the average unit cost (direct and indirect) and average direct labor hours incurred under this contract in the overhaul of each engine model and type may be derived for each reporting individual engine overhauled; however, determination of averages will be considered minimum essential for fulfillment of this provision.

The Bankruptcy Court noted that, "The meaning of this Government-drafted clause is far from clear." F. 924. The requirement of an average cost for each individual engine is self-contradictory. The Government argues that upholding Gary's accounting system because it does supply average cost data allows the last sentence to cancel out the rest of the clause and violates the principle that a provision is to be read so as to give meaning to all of its elements. That principle is sound; however, where, as here, the provision is truly ambiguous, it is construed against the drafting party. *Thanet Corp. v. United States,* 591 F.2d 629, 633, 219 Ct. Cl. ____ (1979), and cases cited therein. Therefore, it appears that Gary's accounting system comported with Clause J-21.

The Government next argues that the Bankruptcy Court erred in finding Gary in compliance with the Cost Ac-

counting Standards at 4 C.F.R. Section 401 and 405. F. 954-969. The Government excepts to the Bankruptcy Court's assertion that Gary's compliance with Section 405 was unchallenged after improper exclusion of nine exhibits which show otherwise. However, reference to the portions of the record cited by the Government indicates that only two exhibits were excluded. The first, U.S. 519-A, was illegible. The Bankruptcy Court offered to allow a legible copy or transcription to be admitted when available. The second, U.S. 520, related to another contract at a later date, and dealt primarily with other regulations. It was properly excluded as irrelevant.

Section 401 requires contractors to report costs in the same manner as they were proposed. The Government argues that the Bankruptcy Court erred in not finding that Section 401 required segregation of costs by contract. However, the Bankruptcy Court had before it unanimous expert opinion that Section 401 does not require segregation. F. 961. The Government complains that the Bankruptcy Court excluded testimony that if Gary had in fact complied, segregation would have been possible. However, the Government admitted that the administrative procedures for determining a Cost Accounting Standards violation had not been pursued. It was on this basis that the Bankruptcy Court excluded the testimony. F. 955.

The Government next argues that the Bankruptcy Court erred in failing to require Gary to segregate costs between contract -0289 and contract -1645. The Bankruptcy Court did, however, find that it was not possible to precisely segregate the costs, and that September 1, 1974 marked a fair chronological division between perform-

ance of the two contracts. The Bankruptcy Court had found that no engine work (the great bulk of the contract) on contract -0289 had been done after that date, and that there was no evidence that any extra work had been done. The Bankruptcy Court approved, and this Court affirms, use of the total cost method as to both contracts. The Government has not alleged or demonstrated any specific prejudice resulting from the failure to precisely segregate costs.

The Government complains that the Bankruptcy Court allowed "start-up" costs as part of Gary's termination settlement. It points to testimony of a Gary accountant that consistent amortization would show that these costs were all recovered under contract -0289, which was not terminated. However, other testimony indicated that proper amortization allocated part of the costs to contract -1645. F. 973. The Bankruptcy Court allowed "start-up" costs in accordance with applicable Armed Services Procurement Regulations. F. 1001. The Government has not demonstrated that the finding that the allowed costs were allocable to contract -1645 is clearly erroneous.

Likewise, the Government complains of the allowance of certain continuing rental costs. It notes that these premises were actually acquired for performance of contract -0289. However, the Bankruptcy Court found that Gary was unable, despite reasonable effort, to extricate itself from its lease obligations entered into for performance of the R2800 contracts. The losses thus incurred were allowed by the Bankruptcy Court pursuant to specific Armed Services Procurement Regulations. F. 991-995. The Government offers no authority or argument to the effect that these provisions are not applicable

where the property was originally acquired under a previous contract to perform the same services.

Finally, the Government complains of certain adjustments to the overhead pool and directs the Court's attention to a twenty-nine page exhibit consisting of the DCAA audit report of the Gary termination settlement proposal. However, the Government does not apprise the Court of which adjustments it objects to or why. Therefore, nothing is presented for review. Likewise, the Government complains of the Bankruptcy Court's allowance of a ten percent profit margin and cites exhibits consisting of ledger sheets which tend to show that Gary was in a loss position even before the constructive change order. However, the Bankruptcy Court made specific findings on profit (F. 1033-1040), and the Government has not provided the Court with a sufficient explanation of its position to enable the Court to intelligently review the findings.

Therefore,

IT IS HEREBY ORDERED that the judgment of the United States Bankruptcy Court for the Western District of Texas on the Contested Matter Respecting Objection to the Claim of the United States of America in Cause No. SA-76-BK-443 is in all things AFFIRMED.

SIGNED and ENTERED this 24th day of June, 1981, at 9:30 o'clock A.M.

/s/ WILLIAM S. SESSIONS
William S. Sessions
Chief Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

NO. SA-76-443-BK

IN RE: GARY AIRCRAFT CORPORATION,
Debtor

HEARING ON MOTION TO DISALLOW CLAIM
OF UNITED STATES

APPEARANCES:

FULBRIGHT AND JAWORSKI
BY: John Bennett, Jr. and
Cecil Jay Olmstead
AND
VON BAUER, COBURN, SIMMONS
AND TURTLE
BY: Richard C. Johnson and
W. Bruce Shirk
Appearing for Debtor;

HENRY VALDESPINO
KENNETH BENNIGHT
ROXANNE ARMSTRONG
COLONEL BILL RUDLAND
MAJOR STEPHEN WARREN
Appearing for the Government.

* * *

BE IT REMEMBERED that on the 18th day of July, A.D. 1977, the above entitled Motion came on for hearing before the Honorable Bert W. Thompson in the above styled and numbered cause, and the following proceedings were had:

* * *

[Pages 1-149, comprising trial testimony and oral argument made prior to court's order denying the motion to stay and vacate, have been omitted. The following appears at p. 150, Transcript of Hearing on Motion to Disallow Claim of United States, July 18, 1977.]

* * *

THE COURT: As to the Government's move to stay the hearing, which was set for today on the Gary Aircraft's motion to disallow the claim of the United States, that is denied. The Government's motion to stay all discovery in this form, concerning issues raised and such motion is denied. And the request to vacate the portion of the Court's order and providing for further pleadings purports to shorten the time for the United States to file proof of claim is denied. Gentlemen, are you ready to proceed with your objection to the claim? . . .

* * *

APPENDIX D

In The
UNITED STATES DISTRICT COURT
For The Western District of Texas
San Antonio Division

In Re: Gary Aircraft Corporation, Debtor

Chapter XI No. SA-75-BK-443
Contested Matter Respecting Objection of Claim
of United States

OPINION ON MOTION TO STAY

On July 18, 1977, a hearing was held in this Court on the Motion to Stay and Vacate filed in this Contested Matter by the United States of America ("Government"), the Claimant herein. The Court denied the Motion. The Court now makes and enters findings of fact and conclusions of law in this Opinion On Motion to Stay.

NATURE OF CONTROVERSY

1. An order was entered in this Chapter XI case which set down for hearing the Contested Matter commenced by the objection of the Debtor, Gary Aircraft Corporation ("Gary"), to the claim of the United States of America (the "Government"). The Government has moved to stay the hearing on the objection, to stay all discovery in this Court concerning the issues raised in Gary's objection, and to vacate the portions of the order requiring that amendments to the Government's proof of claim be filed by five (5) days before the hearing.

PROCEDURAL BACKGROUND

2. On November 30, 1976, the Government filed its Preliminary and Contingent Proof of Claim of the United States of America Entitled To Priority of Payment, dated November 15, 1976. (Exh. M-1). That claim was amended when the Government, on June 16, 1977, filed its Amended Proof of Claim of the United States of America Entitled to Priority of Payment, dated April 22, 1977. (Exh. M-2). That claim was amended when, on July 5, 1977, the Government filed its Amended Proof of Claim of the United States of America Entitled to Priority of Payment, dated June 16, 1977. (Exh. M-3). That claim was amended when, on July 12, 1977, the Government filed its Amended Proof of Claim of the United States of America Entitled to Priority of Payment dated July 6, 1977. (Exh. M-4).

3. After all amendments, the Government claims that Gary is indebted to the Government in the principal sum of $2,686,114.15. The consideration of the debt is alleged as (1) excess reprocurement costs of $145,533.52 resulting from termination of Air Force Contract No. F41608-74-D-1645 (hereinafter, "Contract 1645"); (2) costs in the amount of $2,481,253.70 resulting from loss of Government Property by Gary while performing Air Force Contract No. F41608-71-D-0289 (hereinafter, "Contract 0289"); (3) costs in the amount of $26,210. 70 resulting from loss of Government Property by Gary while performing Air Force Contract No. F41608-73A-3417-0001; (4) costs in the amount of $605.71 resulting from loss of Government Property by Gary while performing Navy Contract No. N00019-72-C-0522; (5) costs in the amount of $25,246.59 resulting from loss of

Government Property by Gary while performing Navy Contract No. N00019-73-D-0043; and (6) costs in the amount of $7,263.93 resulting from loss of Government Property by Gary while performing Army Contract DAAJ01-73-0014. (Exh. M-4).

4. The Government's Proof of Claim alleges that there are no setoffs or counterclaims to the debt, and that the debt is entitled to priority of payment in accordance with Section 65A(5) of the Bankruptcy Act together with Section 3466 and 3467 of the Revised Statutes. (Exh. M-4; *see* Exh. M-1, M-2 and M-3).

5. On June 10, 1977 Gary filed its Motion to Disallow Claim of United States of America. That instrument was emended when, on June 29, 1977, Gary filed its First Amended Motion to Disallow Claim of United States of America, dated June 28, 1977.

6. Gary's First Amended Motion to Disallow essentially denies that Gary has lost any property of the Government, denies the amount of indebtedness claimed by the Government for the property alleged to be lost, asserts affirmative defenses against any such indebtedness, denies default in performance of its contracts with the Government, asserts substantial performance of its contractual obligations to the Government, asserts that it was excusably delayed in performance of such contracts by the Government, and pleads affirmative defenses to the Government's claims.

7. Additionally, such Motion denies that there are no counter-claims to the Government's claims and alleges that the Government had breached its contractual obligations, has wrongfully terminated and harassed Gary

in performance of its contracts, and alleges that the Government is indebted to Gary for, among other things, costs payable in respect of termination and constructive change orders. The Motion also denies that the Government is entitled to priority in payment of any debt Gary does owe the Government and denies that the Government can set off any such debt against any of Gary's claims against the Government.

8. Gary's Motion also applies for an Order permitting Gary to commence or continue litigation seeking the relief of recovery of money or property from the Government as might be appropriate separately from this Contested Matter and without adverse effect from the rules respecting compulsory counterclaims. Finally, the Motion applies for an Order setting firm dates for the filing of amended claims, interventions, appearances, further objections, and for the hearings of the Contested Matter.

9. On June 21, 1977, this Court signed and directed entry of the Order Setting Hearing, Giving Notice and Providing For Further Pleading and to Show Cause, dated June 21, 1977. Such Order:

> (1) Set a hearing on Gary's objection to the Government's claim on July 18, 1977;
>
> (2) Required that any interventions or appearances by the Official Creditors' Committee and any amendments to the Proof of Claim filed by the Government be filed and served not later than five days (5) days in advance of the hearing and required amended objections be filed and served within five (5) days after receipt of service of any such amended claim;

(3) Provided for service of the Motion, Notice, and all subsequent pleadings or notices in the Contested Matter; and

(4) Ordered that Gary be permitted to commence and continue other litigation against the Government separately from this Contested Matter and without any adverse effect from the rules respecting compulsory counterclaims unless the Government showed cause why Gary should be required to commence and prosecute adversary proceedings in the Bankruptcy Court against the Government.

10. The Official Creditors' Committee intervened in this Contested Matter on July 11, 1977, by the Intervention of the Official Creditors' Committee in the Proceeding to Disallow Claim of United States of America filed by Gary Aircraft Corporation, Debtor-in-Possession, dated July 8, 1977. The Official Creditors' Committee essentially adopted the pleadings of Gary with respect to the Government's claim.

11. On July 7, 1977, the Government filed its Motion to Stay and Vacate. The Government moved the Court to stay all discovery in the Bankruptcy Court concerning issues raised in Gary's Motion to Disallow, and to vacate that portion of this Court's Order Setting Hearing, Giving Notice and Providing for Further Pleading, which shortened the time for the Government to file its amended proof of claim.

12. The Motion to Stay and Vacate was accompanied by two affidavits. One was that of the Honorable Richard C. Solibakke, Chairman of the Armed Services Board of Contract Appeals ("ASBCA"). That Affidavit stated that, with respect to Gary's appeal to the ASBCA from

termination of Air Force Contract 1645, he would "assure an expedited written decision on subject appeal following hearing thereon and submission of post-hearing briefs by both parties." The other accompanying Affidavit was that of William P. Rudland, the assigned Government Trial Attorney on an appeal of Gary before the ASBCA. That Affidavit describes the appeal pending before the ASBCA and states that Mr. W. Bruce Shirk, one of Gary's attorneys, did not avail himself of an opportunity for an April, 1977, hearing before the ASBCA.

13. On July 14, 1977, Gary filed its Response to Motion to Stay and to Vacate, dated July 14, 1977. In such response, Gary asserted that the Bankruptcy Court has exclusive jurisdiction to allow and disallow claims, that the Bankruptcy Court has jurisdiction to decide upon an appropriate forum for the liquidation of contingent claims, that the Bankruptcy Court should not permit the ASBCA to liquidate the claims of the Government against Gary, that the proceedings against Gary before the ASBCA have been stayed by Bankruptcy Rule 11-44, and by the Order Granting General Restraining Orders, and that this Court should not lift the stay imposed by Bankruptcy Rule 11-44.

14. The Government filed a Memorandum in Support of Motion to Stay and Vacate, dated July 7, 1977. Gary filed a Memorandum of Law in Support of Response to Motion to Stay and to Vacate, dated July 18, 1977.

HEARING

15. The Motion to Stay and to Vacate was heard and argued on July 18, 1977. The Government relied on its Motion, Affidavits, and the exhibits thereto and called

no witnesses and offered no evidence in support of its Motion to Stay and to Vacate, although Government counsel did cross-examine witnesses called by Gary.

16. In opposition to the Government's Motion to Stay and Vacate, Gary called Judge Benjamin Lee Bird, recently retired after ten years' service as an Administrative Judge with the Armed Services Board of Contract Appeals (hereinafter, the "ASBCA"), to testify as an expert witness concerning the practice and procedure of the ASBCA and government contract and procurement law. Judge Bird testified as an expert without objection. In any event the Court finds him eminently qualified to testify as an expert witness, and finds his testimony to be of material assistance in determining facts in issue in this Motion.

17. Gary also called Mr. W. Bruce Shirk to testify respecting the discussions which occurred between him and Government counsel with respect to the possibility of an April, 1977, trial setting before the ASBCA.

18. Gary also called its president, Mr. Arthur W. Stewart, to testify on the operations of the Debtor-in-Possession and respecting the effect of the pendency unresolved of the Government's claim on the ability of Gary to file and seek confirmation of a plan of arrangement.

19. Gary also offered a number of exhibits into evidence, all of which were admitted without objection by the Government.

DEBTOR, CHAPTER XI CASE AND PLAN

20. Gary is a corporation which was formed in 1962. It has carried on business at locations in San Antonio,

Victoria, Laredo and Hondo, Texas, although at October 28, 1976 and presently it operates only at its Hondo, Texas location. Gary has engaged in several business activities, and its business includes the overhaul of aircraft engines, accessories and other aeronautical components, the manufacture of components for aircraft, engines and other mechanical devices, and technical processes such as electroplating, heat treating, X-ray, magnetic inspection, etc. (Exh. M-7).

21. Gary commenced this Chapter XI case on October 28, 1976, alleging that it was unable to pay its debts as they matured and that it intended to file a plan pursuant to Chapter XI of the Bankruptcy Act. (Exh. M-10).

22. Gary remained in possession of its property. No receiver or trustee was appointed for Gary's assets. Gary was authorized by order herein to operate its business and manage its property as debtor in possession. (Exh. M-11, M-12, M-20, M-21 and M-22).

23. On October 28, 1976 Gary entered into an agreement with Victoria Bank and Trust Company for the temporary financing of its business operations. On December 13, 1976, the arrangement with such Bank for the financing of Gary's business operations was made permanent. (Exh. M-13, M-14, M-15, M-16, M-23 and M-24).

24. Gary was performing a substantial contract for overhaul of the Packette series engine when this Chapter XI case commenced. (Exh. M-13, M-14). On December 13, 1976, Gary was given specific authority to enter into, perform and finance a "follow on" contract for continued

overhaul of the Packette series engine at an increased rate of compensation. (Exh. M-23, M-24). This new contract would be of assistance in continued operations and perhaps in proposal of a plan. (TR. 106-08).

25. On October 28, 1976, a general restraining order was entered herein. (Exh. M-17 and M-18). Additionally, on November 3, 1976, this Court sent its Notice of Initial Meeting of Creditors. That Notice, among other things, gave notice of the filing of Gary's petition commencing the Chapter XI case, of the First Meeting of Creditors scheduled for December 12, 1976, of the Order authorizing Gary to continue its business as debtor-in-possession, of the general restraining order, and of the financing arrangements with Victoria Bank and Trust Company. (Exh. M-19).

26. Gary's "Statement of All Debts of Debtor," Schedule A filed in this Chapter XI case, reflects $4,771,592.70 in debts at October 28, 1976. (Exh. M-8). Gary's "Statement of All Property of Debtor," Schedule B filed in this Chapter XI case, reflects $7,244,160.72 in assets at October 28, 1976. (Exh. M-9).

27. Gary scheduled, as priority claims, taxes owing to the United States (listed as secured by tax liens) in the amount of $99,469.57, and taxes owing to the States in the amount of $20,675.51. (Exh. M-8). Gary also scheduled, as secured, claims in the total amount of $3,365,-312.15 (including the mentioned tax claims). (Exh. M-8).

28. Pursuant to the mentioned financing arrangement, payments against the priority claim for unpaid income taxes were being retired at the rate of $5,000 per month. (Exh. M-13, and M-14 *see* footnote 3 to Exh. M-25

through M-31). All of those tax debts had in fact been paid at the time of the hearing. (TR. 94).

29. Gary's major secured creditor appears willing to relax its security sufficiently to permit formulation and filing of a plan of arrangement. (TR. 97-98, 106-08).

30. Gary's business operations during this Chapter XI case have generated business revenues in excess of expenditures. (See Exh. M-25 through M-31). Gary has successfully negotiated for the award of new overhaul contracts, and the prospects for further profitable business operations are good. (TR. 98, 100-01; *see* Exh. M-24).

31. Gary's claims against the Government, valued for purposes of the Schedules at $2,968,786.90, were included in Gary's Statement of All Property of Debtor as contingent and unliquidated claims. (Exh. M-9).

32. Certain of the Government's claims against Gary were included in Gary's Statement of All Debts of Debtor as an unsecured claim not entitled to priority. (TR. 95-97). Gary scheduled, as a claimed liability without a dollar value, the Government's claim of $595,322.80 for alleged losses of Government property and for $145,533.-52 as excess reprocurement costs. (Exh. M-8). Gary did not know about all of the Government's claim when its Schedules were prepared. (TR. 95-97).

33. The Schedules indicated that Gary's aggregate liabilities and indebtedness is the amount of $4,771,592.72, exclusive of any indebtedness or liability Gary may be determined to have to the Government, and that the aggregate value of Gary's property is $4,275,373.82, exclusive of the amount of Gary's claims against the Government.

34. A plan of arrangement may not be confirmed by this Court unless the Court is satisfied that the plan "is for the best interests of the creditors and is feasible." *See* Section 366 of the Bankruptcy Act.

35. The prospects for confirmation by this Court of a plan of arrangement that is both "feasible" and in the "best interest of creditors" are excellent, except for the problems caused by the priority claims of the Government against Gary. (Findings 20-30).

36. Whether the Government's claim against Gary is entitled to priority depends upon whether Gary is "insolvent," and whether Gary is "insolvent" depends upon whether Gary's assets at a fair valuation are sufficient for payment of its liabilities. Section 64A(5) of the Bankruptcy Act and Section 3466 of the Revised Statutes, 31 U.S.C. § 191. *See United States v. Press Wireless, Inc.*, 187 F.2d 294 (2nd Cir. 1951), *interpreting United States v. State of Oklahoma*, 261 U.S. 253 (1923).

37. Whether Gary's assets are greater or lesser than Gary's liabilities depends almost wholly on the amount of any Government claim allowed against Gary and on the value of any Gary claim against the Government. (Finding 31-33).

38. Recovery by Gary on its claim against the Government is not necessary to the formulation and filing of a plan of arrangement by Gary. (TR. 109-10).

39. Total disallowance of Gary's claim against the Government of itself would not necessarily prevent the formulation and filing of a plan of arrangement by Gary, but Gary lacks the capacity to pay the entire amount of the Government's asserted claim in full and in cash. (TR. pp. 102, 110-12).

40. However, no plan or arrangement filed by Gary can be confirmed unless Gary first puts up a cash deposit adequate for payment in full of all priority claims. Thus, Bankruptcy Rule 11-38 provides, in pertinent part, as follows:

> "(A) Deposit. At the first meeting of creditors, after a plan has been accepted and before confirmation the Court shall . . . fix a time before confirmation within which the debtor shall deposit with the disbursing agent, or in such place and on such terms as the Court may approve, the money necessary to pay all prority debts and costs of administration. . . ."

41. Therefore, the Government's asserted priority claims, if not resolved, will prevent confirmation by this Court of a plan of arrangement. See Findings 34-40. Indeed, the Government in its Brief at p. 14 states:

> "The United States does not dispute the requirement to defer to the ASBCA delays confirmation of a plan in this arrangement. Ultimately, however, the interests to be protected in an arrangement are those of the creditors."

42. The continuation of these Chapter XI proceedings with no definite prospect for liquidation and determination of the Government's asserted prority claim may require the adjudication of Gary as a bankrupt. *See* Bankruptcy Rule 11-42(b).

43. If Gary is adjudicated as a bankrupt, the interests of Gary's unsecured creditors will suffer. Liquidation of the assets of Gary would not result in any equity for the benefit of Gary's unsecured creditors. A forced sale of Gary's machinery, equipment and inventory would not

generate monies equal to their fair valuation, and monies realized upon liquidation probably would not be sufficient to discharge Gary's indebtedness to its secured creditors. (TR. 99-101).

THE GOVERNMENT'S CLAIM AND GARY'S CLAIM

44. The Government's initial Proof of Claim asserted that Gary was indebted to the Government in the principal sum of $711,932.64. That indebtedness was based on alleged excess reprocurement costs resulting from termination of Contract 1645 in the amount of $145,-533.52 and upon alleged costs resulting from loss of Government property by Gary Aircraft Corporation while performing Air Force Contract 0289 in the amount of $566,399.12. (Exh. M-1; *see also* Findings 2-3).

45. On April 13, 1977, Mr. Glen D. Calame, Contracting Officer, made a "final decision" finding Gary pecuniarily liable to the Government in a purported sum certain of $1,895,203.12 for loss of unserviceable Government property under Contract 0289. Payment was demanded within thirty (30) days and advice was given that interest would accrue on the increased debts thereafter. Further, Gary was given notice that this final decision of Mr. Calame was "subject to the procedure of the Disputes Clause" and any appeal therefrom "must be mailed or otherwise furnished to the Contracting Officer within thirty (30) days from the date" of receipt of Mr. Calame's final decision. (Exh. M-5).

46. The Government amended its Proof of Claim to include the additional sums claimed under Air Force Contract 0289 referred to in Mr. Calame's letter. Addi-

tionally, the Government's amended claim included costs resulting from loss of Government property by Gary while performing another Air Force contract not referred to in Mr. Calame's letter, Air Force Contract No. F-4160873-A-3417-0001. The Government's amended Proof of Claim was dated April 22, 1977, although it was not filed until June 16, 1977. (Findings 2-3).

47. After all amendments to its claim, the Government claims Gary is indebted to the Government for six different grounds of liability, based on six different contracts. Five of the Government's claims are based on an alleged loss of property by Gary. The other claim for excess reprocurement costs arising out of the Government's termination of Gary for alleged default in performance of Contract 1645. (Findings 2-3).

48. The nature of the Government's claim for loss of Government property appears self-explanatory. The Government's claim for excess reprocurement costs grows out of a default alleged by the Government as the basis for termination of Contract 1645 together with the alleged costs of reletting to another contractor the unperformed work contracted for pursuant to the terminated Contract 1645. (TR. 48-50).

49. Gary's claims against the Government, includes one for alleged "harrassment" or "interference" by the Government with Gary's business, and one for termination of Contract 1645 for the alleged convenience of the Government. (Findings 7, 31; Exh. M-9). All of the Government's claims against Gary and of Gary's claims against the Government were pending either before the Administrative Contracting Officer or the ASBCA, in one

stage or another of the administratve process, at the time this Chapter XI case was commenced.

50. A termination which is for the convenience of the Government rather than occasioned by the contractor's default obligates the Government to pay for the cost of the work performed by the contractor. A termination which is for default of the contractor does not so obligate the Government. A contract termination that is improperly made for default may be converted to a termination for convenience. (TR. 50-52).

51. These claims for the Government against Gary and of Gary against the Government are related to one another, although they arose out of different contracts and although they were pending separately and in different stages of the administrative process. There is a "chronological and factual relationship between Gary's interference claim and the default" of Gary as alleged by the Government. (Exh. M-6 at p. 2)

52. Gary's alleged interference claim substantially stems from a Government property and quality team that was dispatched to Victoria, Texas in August, 1974 to take "extraordinary action" and monitor Gary's Victoria facility. That team was dispatched as a result of a critical GAO audit of Gary's property control system. "Thus, there is a direct tie-in between the property claims and the so-called interference claim as the latter would not have occurred but for the former." (Exh. M-6 at p. 2).

53. Further, the alleged "property shortages", regardless of the paricular contract under which they were discovered, proximately resulted in the action taken by the team in August, 1974. (Exh. M-6 at p. 3). Additionally,

the "extraordinary action" to be taken by the Government's property and quality team was allegedly directed in response to the "extraordinary circumstances" of the "property situation" at Gary's Victoria facility, and consideration of Gary's alleged mismanagement of its property accounts is necessary for the evaluation of the Government's motivation in taking "extraordinary action". (Exh. M-6 at p. 4).

54. This is not a simple situation of isolated Government claims but rather involves considerations of set-off and the factual connection between the Government's claims and Gary's counterclaims. (Exh. M-6 at p. 5).

55. Failure to give consideration to the Government's claims for property at the same time as giving consideration to the propriety of termination of Gary for default would no doubt encourage further litigation as the Government has indicated that it would resist payment of any award to Gary on the interference and default claims pending resolution of the Government's lost property claims. (Exh. M-6 at p. 5).

56. In short, the Government's claims against Gary and Gary's claims against the Government arise out of the same basic transaction and occurrence. (Findings 51-55).

57. During discovery in one of the administrative proceedings, according to Government counsel, Gary had an opportunity, which it failed to exploi', for an April, 1977 hearing. However, there appears to have been no agreement respecting such an April trial date, and certainly there was nothing more formal than a casual, after hours discussion of the case. (TR. 88-90).

DISPUTES CLAUSE AND ASBCA

58. The contracts between Gary and the Government each contained as "Disputes Clause". A "Disputes Clause" provides as follows:

> (A) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within thirty (30) days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer, a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the extermination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.
>
> (B) This 'Disputes' clause does not preclude consideration of law questions in connection with decisions provided for in Paragraph (A) above: Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

The form of the "Disputes Clause" is prescribed by Section 7-103.12 of the Armed Services Procurement Regulations ("ASPR").

59. A Disputes Clause is a so-called mandatory clause required to be included in every Government Contract. It provides a means for resolving a question of fact in dispute between the Government and a contractor without interruption of the work under the contract. The Contracting Officer resolves the Dispute as he sees fit, and the contractor is obliged to accept the decision as final, subject to this right to appeal. (TR. 12).

60. The Contracting Officer is a Government official given a warrant by appropriate Government officials in the Government procurement offices. He is authorized to make final decisions on behalf of the Government respecting such claims. (TR. 14-16).

61. Appeals from the final decision of a Contracting Officer are made to the Secretary of the Department procuring the contract, or, to the duly authorized representative of the Secretary. A duly authorized representative of the Secretary is the ASBCA. (App. A. ASPR; TR. 12, 63).

62. The ASBCA is chartered by Appendix A of the ASPR. Its jurisdiction is contractual, growing out of the Disputes Clause. (TR. 61-63).

63. Appeals are made to the ASBCA by the contractor. However, controversies between a contractor and the Government may represent claims against the contractor, even though technically it is the contractor who by appeal initiates the proceeding before the ASBCA. Thus the Government's "lost property" claims against

Gary involve claims against Gary, although it was Gary who appealed the Contracting Officer's final decision to the ASBCA. (TR. 17-18).

64. Proceedings before the ASBCA are not overly formal. However, it would not be prudent to proceed with respect to any sizeable claim before the ASBCA without an attorney. (TR. 18-19). The rules of pleading and discovery set out in the Federal Rules of Civil Procedure are followed in ASBCA proceedings. (TR. 19-21). The Federal Rules of Evidence also are followed. (TR. 38-39).

65. The consequences of failure to appeal a "final decision" of a Contracting Officer may be severe. The Government's claim against the contractor becomes final. The Government may enforce its setoff rights (although this is not a matter for ASBCA consideration) or it may file suit on its contract in the Federal courts. (TR. 23-24). The same Government remedies are available in the event the contractor loses the case or takes no appeal from an adverse decision by the ASBCA (TR. 39-40).

66. It would take at least 18 months for the ASBCA to reach a final decision respecting the Government's claim for property lost under Contract F-41608-71-D-0289 that was subject of the April 18, 1977 decision of the Contracting Officer. (TR. 23-24). This assumes use of minimum time periods, cooperation among the parties, no extensions (TR. 25, 31), no problems with discovery of documents, (TR. 27), and therefore is optimistic. (TR. 35). Under conditions that are not optimum the case could go on unavoidably for years. (TR. 69). Two years would not be an unreasonable time. (TR. 70).

67. The same lengthy time periods are applicable respecting a final decision of the ACBCA on the other "lost property" claims of the Government. However, two of the other four of the Government's "lost property" claims against Gary would be eligible for an accelerated ASBCA procedure applicable to claims under $25,000.00. This could shorten the administrative procedure considerably, depending on Gary's willingness to waive pleadings, hearings and briefs. (TR. 44-48). And it would be normal Board practice to consolidate several cases involving the same type of loss of Government property. (TR. 48).

68. Assuming full development of the case for trial it would take at least one year from date of commencement of trial for the ASBCA to reach a final decision respecting the propriety of the Government's termination of Gary for default. This also assumes minimum time periods, cooperation among the parties, and no extensions. (TR. 52-57). Again, under conditions that are not optimum the case could go on unavoidably for years. (TR. 69).

69. The ASBCA giving the "expedited consideration" that Judge Solibakke's affidavit mentioned to the default issue set for trial in October, 1977, would shorten the overall time for resolution of the default claim about a month, no more. (TR. 64).

70. Gary's claim against the Government for costs of termination for the Government's convenience could not be heard by the ASBCA until the ASBCA's determination of the propriety of the Government's termination of Gary for default. Success by Gary on the default issue would result only in an ASBCA remand to the Contracting

Officer for consideration of the question of the proper amount of costs payable (sometimes referred to as the "quantum phase" of litigation). (TR. 54-55).

71. It is reasonable to assume negotiations respecting the amount of costs payable would consume approximately six months, including time for an audit. Litigation before the ASBCA could be expected to follow the same procedural path and consume the same amount of time as that concerning the lost property claim, except that the six months normally elapsing between pleading and trial might be shortened as a result of the extended negotiations. (TR. 56-60). In other words, *after* final decision by the ASBCA of the "default" issue, an additional 18 months for liquidation of Gary's claim against the Government could be required.

72. The ASBCA in such litigation would not consider the applicability of the doctrine of setoff, generally, or the consistency of setoff with Chapter XI of the Bankruptcy Act. (TR. 64).

73. The ASBCA appears to do a creditable job discharging its assigned duties and to have established a general reputation for fairness. (TR. 73).

74. However, qualifications of ASBCA members are not in any way unique, although they have been selected from among those with specific experience in Government procurement. On a matter that ordinarily would be heard by the ASBCA, a Bankruptcy Judge or United States District Judge could accomplish a fair fact finding with ease if properly instructed by counsel. (TR. 77-78).

THE BANKRUPTCY COURT'S JURISDICTION TO ALLOW OR DISALLOW THE GOVERNMENT'S CLAIM

75. The Bankruptcy Act provides for Bankruptcy Court jurisdiction to allow or disallow claims in a Chapter XI case as well as in a Bankruptcy case under Chapters I through VII of the Bankruptcy Act. In that regard, Section 302 of the Bankruptcy Act provides as follows:

> "The provisions of Chapter I to VII, inclusive, of this Act shall, in so far as they are not inconsistent with or in conflict with the provisions of this Chapter [XI], apply in proceedings under this Chapter [XI] . . ."

Section 2 of the Bankruptcy Act provides, in pertinent part:

> "The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created Courts of Bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—
>
> * * *
>
> "(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;
>
> * * *

"(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relations thereto, except as herein otherwise provided . . .

* * *

"(9) Confirm or reject arrangements or plans proposed under this Act, set aside confirmations of arrangements or wage-earner plans and reinstate the proceedings in cases;

* * *

"(12) Discharge or refuse to discharge bankrupts, set aside discharges, determine the dischargeability of debts, and render judgments thereon;

* * *

"(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: *Provided, however,* That an injunction to restrain a court may be issued by the Judge only. . . ."

76. It is clear that the power of the Bankruptcy Court to allow or disallow claims extends to claims filed by the Government. In that regard, Section 355 of the Bankruptcy Act provides:

"*Creditors, including the United States,* any State, and any subdivision thereof, *shall file their proofs of claim before confirmation* except [in the case of two exceptions not here pertinent]." (Emphasis added.)

Similarly, Section 57N of the Bankruptcy Act provides, in pertinent part:

> "Except as otherwise provided in this Act, *all claims provable under this Act, including all claims of the United States be proved and filed in the manner provided in this section. Claims which are not filed* within six months after the first date set for the first meeting of creditors *shall not be allowed: Provided, however,* That the court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any State or any subdivision thereof . . ."

Accordingly, Bankruptcy Rule 302(a), made applicable in Chapter XI cases by Bankruptcy Rule 11-33(b) (1), provides as follows:

> *"In order for his claim to be allowed, every creditor, including the United States,* any state, or any subdivision thereof, *must file a proof of claim* in accordance with this rule, except as provided in Rules 303 and 304." (Emphasis added.)

77. A number of decisions sustain exercise by the Bankruptcy Court of its Congressionally granted jurisdiction to allow or disallow claims against a debtor or its estate. *E.g., United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506 (1940); *Danning v. United States,* 259 F.2d 305 (9th Cir. 1958), *cert. denied,* 359 U.S. 911 (1959); *In Re Greenstreet,* 209 F.2d 660 (7th Cir. 1954); *United States v. Paddock,* 187 F.2d 271 (5th Cir. 1951); *In the Matter of Bruce Construction Corp.,* 217 F. Supp. 926 (S.D. Fla. 1963), rev'd on other grounds, 329 F.2d 678 (5th Cir. 1964). *See also*

Gardner v. New Jersey, 329 U.S. 565 (1946), where the Supreme Court in upholding the Bankruptcy Court's jurisdiction to allow or disallow a state's claim for taxes, stated that the Bankruptcy Act "deals not only with claims for private parties, but with those of public agencies as well." 329 U.S. at 572.

78. Jurisdiction for the final allowance or disallowance of claims against a debtor or its estate appears to be exclusively vested in the Bankruptcy Court.

> *"During the course of the administration of the estate, many questions may arise, such as* the appointment of receivers and trustees, *orders giving priority to the claim of a creditor, orders directing a set-off of mutual debts,* examinations determination of exemptions, *allowance and disallowance of claims,* and the like. *Over such matters the Bankruptcy Court has exclusive jurisdiction,* and proceedings in relation to them are expressly excluded from the provisions of § 23(a). *Once the Petition has been filed, the Bankruptcy Court's jurisdiction is paramount and no other Court may order or decree deprive it of this jurisdiction. With respect to all proceedings in bankruptcy the Court may act summarily and in that manner determine the rights of the parties affected. And this rule applies even as against the United States Government seeking to enforce against the trustee an alleged priority of payment of a Government claim;* the Government must maintain its suit in the Bankruptcy Court, and not by a plenary suit in equity." 1A Collier on Bankruptcy, ¶ 23.04 [1] at 450-51 (194th Ed. 1976) (Emphasis added).

Accordingly, in *Pepper v. Litton,* 308 U.S. 295 (1939), the Supreme Court of the United States wrote:

"Courts of Bankruptcy are constituted by §§ 1 and 2 of the Bankruptcy Act, 30 Stat. 544, 11 U.S.C.A. §§ 1(8), 11, and by the latter section are invested 'with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings' . . . *Among the granted powers are the allowance and disallowance of claims;* the collection and distribution of the estates of bankrupts and the determination of controversies in relation thereto; the rejection in whole or in part 'according to the equities of the case' of claims previously allowed; and the entering of such judgments 'as may be necessary for the enforcement of the provisions' of the act. *In such respects the jurisdiction of the bankruptcy court is exclusive of all other courts. United States Fidelity & Guaranty Company v. Bray,* 225 U.S. 205, 217, 32 S.Ct. 620, 625, 56 L.Ed. 1055.

"Hence, this Court has held that a bankruptcy court has full power to inquire into the validity of any claim asserted against the estate and to disallow it if it is ascertained to be without lawful existence. Lesser v. Gray, 236 U.S. 70, 35 S.Ct. 227, 59 L.Ed. 471. And the mere fact that a claim has been reduced to judgment does not prevent such an inquiry. 309 U.S. at 303-305." (Emphasis added.)

And more recently, the Supreme Court wrote the following respecting the Bankruptcy Court's jurisdiction to allow or disallow claims:

"It is . . . clear that the expressly granted power to 'allow,' 'disallow' and 'reconsider' claims, Bankruptcy Act, § 2 sub. a (2), 11 U.S.C. § 11, sub. a (2) (1964 ed.), which is of 'basic importance in the administration of a bankruptcy estate,' *Gardner v. State of New Jersey,* 329 U.S. 656, 573, 67 S.Ct. 467, 471, 91 L.Ed. 504, is to be exercised in sum-

> mary proceedings and not by the slower and more expensive processes of a plenary suit. *United States Fidelity & Guaranty Co. v. Gray,* 225 U.S. 205, 218, 32 S.Ct. 620, 625; *Wiswall v. Campbell,* 93 U.S. 347, 350-351. *This power to allow or to disallow claims includes 'full power to inquire into the validity of any alleged debt or obligation of the bankrupt upon which a demand or a claim against the estate is based. This is essential to the performance of the duties imposed upon it.' Lesser v. Gray,* 236 U.S. 70, 74, 35 S.Ct. 227, 228, 59 L.Ed. 471. *The trustee is enjoined to examine all claims and to present his objections,* Bankruptcy Act, § 47, sub. A(8), 11 V.S.C. § 75, sub. a(8) (1964 ed.), *and when objections are made, [the court] is duty bound to pass on them, Gardner v. State of New Jersey,* 329 U.S. 565, 573, 67 S.Ct. 467, 471. *Katchen v. Landy,* 382 U.S. 323, 329 (1966)."

Accord, 1 COLLIER ON BANKRUPTCY ¶ 206 (14th Ed. 1976), esp. n. 7.

79. To hold that the Bankruptcy Court could be divested of its jurisdiction to allow or disallow particular claims could result in a hearing in a non-bankruptcy forum that was useless and unnecessary because of the absence of any objection on the part of the debtor or trustee to the claim or claims. Bankruptcy Rules 301(b) and 11-33(a) provide that proof of claim is entitled to a *prima facie* presumption of its validity and amount. Were the Bankruptcy Court divested of its jurisdiction, a serious question would be raised as to the *prima facie* presumption of validity that otherwise would obtain in the case of an undisputed proof of claim filed in a Bankruptcy Court.

80. Permitting contractual divestment of Bankruptcy Court jurisdiction would raise questions as to the juris-

diction of a Bankruptcy Court to disallow a claim not filed in the time and manner required by the Bankruptcy Act. In that regard, Section 371 of the Bankruptcy Act provides as follows:

> "The confirmation of an arrangement shall discharge a debtor from all his unsecured debts and liabilities provided for by the arrangement, except as provided in the arrangement or the other confirming the arrangement, but excluding such debts as, under Section 17 of this Act, are not dischargeable."

Section 355 of the Bankruptcy Act requires the filing of a claim before confirmation. Therefore, divestment of the Bankruptcy Court's jurisdiction to disallow the claims of the Government subject to a Disputes Clause would necessarily imply *either* that claims subject to litigation in a non-bankruptcy forum would be disallowed if not finally determined and allowed in time to be subject to a confirmed plan of arrangement *or* that such claims are not subject at all to the Bankruptcy Court's jurisdiction and cannot be discharged by confirmation of a plan of arrangement. If the former were the implication, then the jurisdiction of the non-bankruptcy forum would be embarrassed by the prospect of its judgment being void at inception due to disallowance for untimely filing. If the latter were the implication, then the fundamental Congressional policy of the Bankruptcy Act respecting rehabilitation of debtors by granting a discharge of indebtedness would be significantly undermined by the *de facto* amendment of Section 17 of the Bankruptcy Act to provide that claims based on disputes arising under contracts containing a Disputes Clause were effectively non-dischargeable.

81. Furthermore, construing the Disputes Clause to divest the Bankruptcy Court of jurisdiction would operate to the substantial detriment of the creditors of the debtor or bankrupt. A debtor in possession in a Chapter XI proceeding has the title, rights, duties and powers of a trustee in bankruptcy appointed in a "straight" bankruptcy under Chapters I through VII of the Bankruptcy Act. Section 47 of the Bankruptcy Act provides, among other things, that it is the duty of a trustee in bankruptcy to "examine all proofs of claim and object to the allowance of such claims as may be improper . . ." Divesting a Bankruptcy Court of jurisdiction to allow or disallow claims against the bankrupt would frustrate the performance by a trustee in bankruptcy of his duty pursuant to Section 47(a) (8), and for the very same reason would frustrate the duties of a debtor in possession in Chapter XI proceedings.

82. At the very least, divestment of a Bankruptcy Court of jurisdiction to allow or disallow claims against a debtor or its estate necessarily would frustrate the confirmation of a plan of arrangement in a Chapter XI case or the liquidation of an estate in a "straight" bankruptcy. Cases such as this one, involving an asserted priority that would completely reorder the distributions of any consideration pursuant either to a plan of arrangement or to a liquidation provide a good example of the potential adverse effects.

83. Further, permitting divestment of the jurisdiction of a Bankruptcy Court to allow or disallow claims could be taken necessarily to imply jurisdiction of nonbankruptcy courts to proceed to liquidate such claims without consent of the Bankruptcy Court. That would be clearly

contrary to the policy of the Bankruptcy Act to protect and rehabilitate a bankrupt or debtor, as embodied in Section 2 of the Bankruptcy Act and Bankruptcy Rule 11-44.

84. Obviously, divestment of the jurisdiction of a Bankruptcy Court of power to allow or disallow claims would constitute a startling exception to the Bankruptcy Act, its purposes and policies. The Court has been directed to no provision of any Act of Congress that contemplates, explicitly or implicitly, such a startling departure from Congressional policy.

85. It cannot be overemphasized that Congress has made a specific grant of subject matter jurisdiction to the Bankruptcy Court. The Bankruptcy Act gives the Bankruptcy Court authority to allow and disallow claims, grants exclusive jurisdiction of the debtor and its property to the Bankruptcy Court, treats exhaustively a complex area of public interest and establishes the Bankruptcy Court as a specialized tribunal with original jurisdiction over certain complex matters of a public interest. The ASBCA appears to have none of the Congressional roots of the Bankruptcy Court, only a contractual basis for jurisdiction, and by regulation is nothing more than the authorized representative of the Secretary of Air Force.

86. Accordingly, *Order of Railway Conductors v. Pitney,* 326 U.S. 561 (1946), *Smith v. Hoboken Rd. Whse. & Steamship Connecting Co.,* 328 U.S. 123 (1946), and *Nathanson v. National Labor Relations Board,* 194 F.2d 248 (1st Cir. 1952). are not obstacles to this Court's jurisdiction to liquidate the Government's claim. *Pitney* noted that the Bankruptcy Act specifically provides that "No Judge or trustee acting under this Act

shall change the wages or working conditions of railroad employees except in the manner prescribed in the Railway Labor Act. . . ." 326 U.S. at 564. In addition, the Court pointed out that Congress had specifically provided tribunals to interpret such matters as were then pending, that Congress had designated an agency particularly competent to handle such basic questions, and that cases dealing with the history and purposes of the Railway Labor Act had concluded that the Railway Labor Act was intended to leave a minimum of responsibility to other Courts. The *Pitney* case is clearly distinguishable, not only because of the express Congressional dictates and decisions dealing specifically with the Railway Labor Act, but also because of the express language of the Bankruptcy Act providing for deference to the Railway Labor Act in Chapter and cases. Similarly, in *Smith*, express Congressional dictates were found to have created an exclusive tribunal for disposition of claims subject to the Interstate Commerce Act. And in *Nathanson*, where arbitration had been commenced and completed and an order had been issued for payment of back wages prior to the commencement of bankruptcy, the Court permitted further proceedings before the National Labor Relations Board stating:

> "A sound discretion *may* indicate that a particular controversy should be remitted to another tribunal for litigation. . . . And where the matter in controversy has been entrusted *by Congress* to an administrative agency, the Bankruptcy Court normally should stay its hand pending an administrative decision. . . ." 344 U.S. at 30 (emphasis added).

Thus, *Nathanson* recognizes that the Bankruptcy Court normally supervises liquidation of claims and that the

determination to proceed to another forum is a matter of sound *discretion. Nathanson* does not support the proposition that the ASBCA has exclusive jurisdiction to adjudicate such disputes as are raised in the Government's proof of claim.

87. To conclude, to hold that the Disputes Clause could operate to *divest* the Bankruptcy Court of its otherwise *exclusive* jurisdiction to allow and disallow claims would be wholly inconsistent with the Bankruptcy Act, its purposes and policies. (Findings 75-86).

THE BANKRUPTCY COURT'S DISCRETION TO DEFER TO THE ASBCA

88. The Bankruptcy Court has discretion to consent to an outside determination of an issue otherwise adjudicable in the Bankruptcy Court. *E.g., Thompson v. Magnolia Petroleum Co.,* 309 U.S. 478 (1940); *In re Baldwin,* 291 U.S. 610 (1934); *Gramil Weaving Corp. v. Reindeer Fabrics,* 185 F.2d 537 (2d Cir. 1950); *In re American Fidelity Corp.,* 28 F. Supp. 462 (S.D. Cal. 1939); *In re Missouri Gas & Electric Service Co.,* 11 F. Supp. 434 (N.D. Mo. 1935); 1 COLLIER ON BANKRUPTCY ¶ 206 (14th Ed. 1976).

89. Section 57d of the Bankruptcy Act empowers the Bankruptcy Court to liquidate any unliquidated or contingent claim against the debtor:

> "Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for a cause by the court upon its own motion: *Provided, However,* That an unliqui-

> dated or contingent claim shall not be allowed unless liquidated with the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or a reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this Act."

The Bankruptcy Court is free to choose the most appropriate means of liquidation and may decide to await the determination of another court of competent jurisdiction. 3 COLLIER ON BANKRUPTCY, ¶ 57.15 (3.2) (14th Ed. 1976).

90. However, the Bankruptcy Court's choice to liquidate a claim against the estate in any particular forum is within its sole discretion and reviewable only on the ground of abuse of discretion.

> "[N]o particular reason need be present to entitle the Bankruptcy Court to proceed to liquidation in its own forum. Its sound discretion alone decides where and how a claim contingent or otherwise unliquidated at the time when a petition in bankruptcy was filed shall be liquidated. The Bankruptcy Court has exclusive jurisdiction to direct the manner and the time in which such a claim is to be liquidated or estimated as to its amount, and its discretion should be subject to review only on grounds of abuse of discretion." 3 COLLIER ON BANKRUPTCY ¶ 57.15(3.2) (14th Ed. 1976).

91. The original petition Gary filed under Bankruptcy Rule 11-6 operated as an automatic stay of any proceeding against Gary. In that regard, Bankruptcy Rule 11-44 provides in pertinent part:

"*(a) Stay of Actions and Lien Enforcement.* A petition filed under Rule 11-6 or 11-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor. . . .

"*(b) Duration of Stay.* Except as it may be deemed annulled under subdivision (c) of this rule or may be terminated, annulled, modified, or conditioned by the bankruptcy court under subdivision (d), (e), or (f) of this rule, the stay shall continue until the case is closed, dismissed, or converted to bankruptcy. . . .

* * *

"*(d) Relief from Stay.* Upon the filing of a complaint seeking relief from a stay provided by this rule, the bankruptcy court shall, subject to the provisions of subdivision (e) of this rule, set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify or condition such stay. . . .

92. Moreover, on October 28, 1976, an Order Granting General Restraining Order was signed and entered in this Chapter XI case (Findings 25). Such Order Granting General Restraining Orders in pertinent part provided:

"ORDERED that all persons, firms and corporations, including all creditors of said debtor, and the representatives, agents, attorneys and servants of all such creditors. . . . be hereby jointly and severally enjoined, restrained and stayed from removing, transferring, disposing of, or attempting in any way to remove, transfer or dispose of or from in any way interferring with the debtor or with the property, wherever located, of the debtor. . . . and all said persons be further enjoined from commencing or continuing to prosecute any actions against said debtor, other than before this court. . . ."

93. A Notice of Initial Meeting of Creditors, dated November 3, 1976, was sent out to all of the creditors of Gary Aircraft Corporation. Among other things, such Notice of Initial Meeting of Creditors provided:

> "This Court has also entered an order whereby all creditors of the Debtor have been restrained until further Order of this court to stay the commencement or continuation of suits against the Debtor, taking any further action in any suits heretofore filed against the Debtor, from levying any garnishment, attachment or execution against the Debtor, or interferring with the Debtor in Possession or its property wherever located.

94. According to the Advisory Committee's Note to Rule 11-44, "The reference to a stay of other proceedings against the debtor is to signify the inclusion of a pending arbitration proceeding with the scope of the automatic stay". One commentator remarked upon the scope of Rule 11-44 as follows:

> "It [Rule 11-44] provides for an automatic stay of any action pending against the debtor and of any actions, proceedings or acts seeking lien enforcement, and also for a stay of any proceeding looking toward the liquidation or rehabilitation of the debtor except a pending Chapter X case. . . . Rule 11-44 stays everything basically." King, The Proposed Chapter XI Rules and Official Forms, 47 American Bankruptcy Law Journal 127, 131 (1973).

Another commentator analyzes the scope of Rule 11-44 in these terms:

> "The automatic stay which thus becomes operative upon the filing of the Chapter XI case is framed

> in language which affords the broadest possible scope. While Section 314 empowers the court to stay the commencement or continuation of suits, Rule 11-44(a) operates to stay the commencement or continuation of any court or other proceeding, thus indicating the inclusion of a proceeding which may not strictly be denominated as a suit but which may be nonetheless operative as against the debtor or its property. A typical example would be a pending arbitration."

14 *Collier on Bankruptcy,* ¶ 11-44.02, page 11-44-9 (14th Ed). See also, *Id.* ¶ 11-44.03, page 11-44-14.

95. A proceeding before the ASBCA is substantially similar to an arbitration proceeding. The jurisdiction of the ASBCA and the jurisdiction of an arbitration tribunal are both conferred by agreement of the parties. Neither the ASBCA nor an arbitration tribunal has the power to enforce its decisions. Both ASBCA proceedings and arbitration proceedings are conducted for the convenience of the parties participating therein. (Findings 58-65). Therefore, a rule designed to stay arbitration proceedings and which operates to stay proceedings in court of general jurisdiction should be effective to stay ASBCA proceedings.

96. Even if the ASBCA is viewed to be more of an administrative tribunal than an arbitration panel, Rule 11-44 should operate to stay its proceedings. In *In Re Hillsdale Foundry Co.,* 1 Bankruptcy Court Decisions 195 (W.D. Mich. 1974), it was held that Rule 11-44 stayed Michigan's Department of Natural Resources from enforcing certain air pollution control laws. In *In Re Airport Iron & Metal, Inc.,* 1 Bankruptcy Court Decisions 281, 293 (S.C. N.Y. 1974), the Court rules that the

NLRB could be enjoined from proceeding on unfair labor practice complaints if "the continuance of the Board hearing would embarrass or delay the administration of the estate of the debtor."

97. The decision of the Contracting Officer, absent consent of the Bankruptcy Court, constitutes a violation of the stay. Such decision purports to require an appeal by the contractor. Although in a technical sense it is the contractor which initiates the action before the ASBCA by appealing decisions of the Contracting Officer finding it liable for allegedly lost property, the ASBCA proceeding is a "proceeding against" the contractor for purposes of the Court's restraining order because the contractor's participation in the proceeding is required to avoid the finality of an adjudication of liability against the contractor. For that reason, the decision of the Contracting Officer "commences" the ASBCA proceeding. (Findings 45, 63-65).

98. Any contention that an appeal to the ASBCA is not a "proceeding against" the contractor is not sound. For example, in *Hayes International Corp.*, ASBCA No. 18447, 75-1 BCA L 11,076, the Government sought a downward adjustment of the contract price because the contractor allegedly submitted defective cost and pricing data. The parties settled the matter and the contractor then sought recovery of legal fees incurred as a result of the Government's allegations. The Government contended that the legal fees were an unallowable cost because they were incurred in connection with the prosecution of a claim against the Government. In holding that the fees were allowable, the Board clearly established that the claim was by the Government, not the contractor. The Board stated:

> "Certainly where the Government has asserted the existence of defective pricing data and seeks a downward adjustment of the contract price, it is the Government who is making a claim against appellant, not the appellant prosecuting a claim against the Government." 75-1 BCA at 52,726 (emphasis added).

99. In Gary's case, it is similarly the Government that is seeking to impose liability on Gary for the allegedly lost Government property. The decision of the Contracting Officer as well as the *de novo* appeal to the ASBCA, in which the Government has the burden of proof, would be "proceeding against" Gary and is thus enjoined. And since the United States has not applied for relief from the stay imposed by Rule 11-44 and by this Court, the ASBCA could not now lawfully proceed even should this Court decline to exercise its jurisdiction over the claims of the United States.

100. Moreover, even if the Government had moved to lift the stay to permit prosecution of a proceeding against the Debtor, there is nothing in the record to show cause to lift the stay. Before the Bankruptcy Court utilizes its discretion to lift a pending stay, a factual basis must be developed to base a finding of good cause to exercise such discretion.

> "While there seems to be no standardized criteria for the exercise of a judgment permitting suit against a debtor, whatever criteria are considered by the Court should bear a rational basis to the point or the preceding in which they arise, the balance of hurt between the parties, the nature of the interest to be protected, and the overall congenial statutory purpose of Chapter XI."

In re Groundhog Mountain Corp., 4 Collier Bankruptcy Cases 387, 392 (S.D. N.Y. 1975).

101. Cause to lift a stay against proceedings against the Debtor may be found if the matter in controversy has been entrusted by Congress to an administrative agency, *Nathanson v. National Labor Relations Board,* 344 U.S. 25 (1952). In that case the Court affirmed lower-court decisions permitting liquidation of employee back pay claims before the National Labor Relations Board where arbitration had been commenced, completed and an order for payment of back wages issued prior to commencement of bankruptcy. Even still, the Court of Appeals prescribed that the National Labor Relations Board make its determination regarding review of the arbitration proceedings within two months subsequent to the decision affirming the Trial Court's ruling. *Nathanson v. National Labor Relations Board*, 194 F.2d 248 (1st Cir. 1952). Similarly, in *In re Airport Iron & Metal, Inc.*, 1 COLLIER'S BANKRUPTCY COURT DECISIONS 281 (S.D. N.Y. 1974), it was held that to obtain injunctive relief precluding the National Labor Relations Board from disposing of an unfair labor practices complaint a debtor must show that the administration of the debtor's estate was being embarrassed or delayed, to the point of threatened or impending irreparable injury. And, findings that issues in litigation are entirely local rather than federal, that a state court was a more convenient and appropriate forum for determination of such issues, that such a state court proceeding would result in liquidation of the amounts claimed, and that prosecution of the actions of the state court would neither interfere with the proper administration of the debtor's estate nor with the formulation of a plan of reorganization would sustain a finding of cause

to lift a stay. *In Re Young Properties Corp.*, 5 COLLIER BANKRUPTCY CASES 414 (S.D. Cal. 1975) (refusing to vacate the automatic stay). Additionally, unreasonable hardships on parties involved in stayed proceedings and the adverse effect on the routine duties and calendar of the Bankruptcy Court as a result of conducting such suit will support exercise of the Bankruptcy Court's discretion to vacate an automatic stay. *Austin v. Wendell-West Co.*, 9 Collier Bankruptcy Cases 319 (9th Cir. 1976). In *Austin*, the Court deferred its jurisdiction to the pending state court proceeding since it did not have the facilities to support a lengthy trial, since the length of the trial would have disrupted the Bankruptcy Court's routine duties and calendar, and since numerous parties (23) to the stayed proceeding would have been subjected to substantial expense in continuing the trial in Seattle (location of bankruptcy proceeding) rather than Los Angeles (location of the state court proceeding).

102. Thus, at the outset, it should be noted that this Court presently may lack discretion to permit liquidation of the Government's claim in any forum other than the Bankruptcy Court because at the present all suits or other proceedings against Gary are stayed and the Government has not sought the termination, annulment, modification or lifting of the stay to permit prosecution of any proceeding against Gary. The Government has offered *no* evidence on any of these sorts of matters which might constitute, in appropriate circumstances, cause to lift the stay. And such evidence as is in the record and which would be probative on the issue of cause to lift the stay would indicate that good cause does not exist to lift the stay. (Findings 91-101).

103. One purpose of the "Disputes Clause" appears to be the prevention of work stoppage by a Government contractor in the event of a dispute arising under the contract. (TR. 12). If this is true, that policy cannot be abraided here because Gary has been terminated and the contract relet to another contractor.

104. The Government's right to insist on the administrative procedures established by the "Disputes Clause" of its contracts is clearly waivable. *Jefferson Construction Co. v. United States,* 392 F.2d 1006 (Ct. Cl. 1968); *W.R.B. Corp. v. United States,* 177 Ct. Cl. 909, 914-15 (1966). In *Jefferson,* the Court stated:

> "It is clear, however, that the parties may, by a waiver agreement, submit a controversy for initial resolution by the Court and thereby modify the contractual agreement to proceed before an administrative board."

And, in *George Bennett v. United States,* 371 F.2d 859 (Ct. Cl. ____) the Court of Claims wrote:

> "The Government's (or the Plaintiff's) right to a judicial review limited to the administrative record is a procedural right—it is not jurisdictional—and it may therefore be waived."

105. Additionally, it is recognized that the ASBCA functions only as a representative of the Secretary of the Air Force in this matter. (Findings 58-63). The Government may withdraw delegation of authority to the ASBCA. *GAO Decision B-165,* 279, February 18, 1969. In *GAO Decision B-165* the United States General Accounting Office determined not to delay payment by the Government of a termination settlement that had been pending before

the ASBCA. A contracting Officer had determined a contract to be in default and the contractor had appealed to the ASBCA. Notwithstanding pendancy of the appeal before the ASBCA, the Assistant Secretary of the Air Force reviewed and corrected the Contracting Officer's default determination. The Comptroller General stated:

> "Reference to Appendix A of the ASPR, which relates to appeals before the ASBCA, does not disclose any requirements that the Assistant Secretary follow any particular procedure in exercising his authority to make a particular decision in his own right rather than through the agency of ASBCA, nor is there any provision in ASPR for review by ASBCA of any decision made at the Secretarial level."

The clear implication of *GAO Decision B-165* is that litigation before the ASBCA is neither an inflexible federal policy nor a matter of Congressionally extended jurisdiction, but is a matter of administrative convenience for the Secretary of the Air Force.

105. *GAO Decision B-165* indicates that the Government's proofs of claim filed in these proceedings and its express invocation of this Court's jurisdiction thereby, may have constituted a withdrawal from the ASBCA of authority for resolution of the Government's claim. It is an elementary principle of the law of jurisdiction of the Bankruptcy Court that one filing a proof of claim with the Bankruptcy Court consents to the jurisdiction of the Bankruptcy Court to determine the controversies arising out of such claim. E.g., *Katchem v. Landy,* 382 U.S. 323 (1966). The Government put *no* evidence whatever into the record negating such consent. There is nothing in

the Government's proofs of claim, or in the testimony of any Government witness, in ASPR, or in the GAO decision just quoted that is inconsistent with the conclusion that the Secretary intentionally terminated the course of the administrative process and expressly invoked the jurisdiction of this Court to allow or disallow the Government's claim.

107. The ASBCA has repeatedly deferred to Bankruptcy Court jurisdiction so that a determination in the bankruptcy forum could be made expeditiously and so that wasteful multiple litigation could be avoided. Thus, in *Hugh E. Ebby Co.*, ASBCA No. 5039, 1962 BCA ¶ 3379, the ASBCA held that the claims and counterclaims presented to the Board were already before the Bankruptcy Court and therefore required dismissal of a Board proceeding. As the ASBCA stated:

> "[E]ven were we to regard the filing of the Government's claim for the excess costs in the bankruptcy proceeding as the equivalent of a Contracting Officer's decision and Appellant's letter of 29 May 1958 as a timely appeal therefrom, we would still feel compelled to reckon with the fact that *the same matter which that would involve is presently before the Bankruptcy Court, and under its order of 22 May 1958 was retained there prior to any appeal being sought to be taken here; accordingly, that in itself would require us to dismiss on our own volition rather than to allow the appeal to proceed before us on the merits.* In stating this last we are not overlooking the Government's contrary argument as to what was intended by the Bankruptcy Court's order. We simply entertain a different view in that record.
>
> "According to that argument on behalf of the Government there was nothing in the 22 May 1958

Order of the Bankruptcy Court which says that the Court will not adjudicate the claim on the basis of the contractual rights of the parties as spelled out in the "default" and "disputes" provisions of the subject contract; that when it was stated in the order that the claim in question of the United States Government would be adjudicated in the Bankruptcy Court and when the Government consented to such and filed its waiver of deposit, that this did not mean that the Government was waiving the "disputes" procedures of the contract but meant that the Bankruptcy Court "would adjudicate the claim by itself" when the parties had exhausted the proper administrative remedies.

* * *

"It is our decision upon the facts of this case as they affect the instant appeal that, with the Government and surety company on the contractor's performance bond having recourse to the Bankruptcy Court's jurisdiction to determine their rights against Appellant arising out of the Government's termination of the contract and its reprocurement elsewhere, this Board could not, without resultant confusion and likely intrusion into the very area in which the Bankruptcy Court would have the right to make its own determination, fully determine the question of whether the right to contest the claimed finality of the 26 March 1958 excess cost demand has been lost through failure on the part of either the Receiver or the Debtor to notice an appeal to the Secretary of the Navy within 30 days following the Debtor's receipt of the aforesaid letter. 1962 BCA at 17, 381-82 (emphasis added).

Similarly, in *The Tele-Tronics Co.*, ASBCA No. 9188, 9188, 1963 BCA 19,164 ¶ 3844, the Board also dismissed an appeal because of a concurrent Bankruptcy

Court proceeding. In *Tele-Tronics,* the contracting officer had assessed $27,000 reprocurement costs following the termination for default of the bankrupt's contract. In addition, the Government filed a proof of claim in the bankruptcy proceedings. The bankrupt contractor disputed the Government's claim and filed a counterclaim before the Bankruptcy Court. At the same time, the contractor requested that the proceedings before the board be halted in light of the concurrent bankruptcy proceedings. After noting that it would be bound by the Bankruptcy Court's findings on the Government's claim and on the Contractor's counterclaim, the Board stated:

> *"In this case the matter has been set for hearing before the Referee in Bankruptcy, whose decision is subject to review by the [United States District] Court. There is nothing to be gained by duplicating those procedures.*
>
> "So far as concerns the objection to dismissal without prejudice, any action by this Board must be delayed, if taken at all, until completion of the pending Bankruptcy proceedings. The same problem is presented whether the case is retained upon the docket in an inactive status until that time, or is dismissed with the right to reinstate at that time.
>
> "These considerations do not demonstrate a lack of jurisdiction on our part to hear and adjudicate appellant's appeal. This is a conventional type of dispute often entertained under these "disputes" procedures, and these procedures clearly contemplate that they will be employed prior to resort to the Courts. The fact that the Trustees filed the appeal after institution of the Bankruptcy proceedings is sufficient evidence that they were authorized to subject themselves to our jurisdiction, notwithstanding the prior restraining order. *Since proceedings have*

> *already been instituted in the Bankruptcy case, however, which proceedings will probably be determinative of the same issues that are involved in this appeal, there is nothing to be gained by duplicating those proceedings, or by engaging in a futile race to decide this appeal before they have been completed.* 1963 BCA at 19,164 (emphasis added).

In *Cline Electric Mfg. Co.*, ASBCA Nos. 5377, 5845, 60-2 BCA ¶ 2694, both parties requested that the issues presented to the Board be decided by the Bankruptcy Court. The Board agreed, stating:

> *"The ultimate decision with respect to the Government's claims and the appellant's counterclaims, insofar as the assets of the bankrupt estate are concerned, must be made by the Bankruptcy Court.* Our decision on these issues is subject to review by the Bankruptcy Court to the extent indicated in the "Disputes" article of the contract. The parties are desirous of submitting all issues to the Bankruptcy Court for determination and agree to be bound by the decision of that court. They wish to reserve, however, the right to reinstate so much of the issues now before us as the Bankruptcy Court may decline to decide on the grounds that appellant has failed to exhaust its administrative remedies. Counsel for the parties are of the opinion that the suggested procedure would result in a more expeditious final disposition of all matters in dispute, including the claim filed by the Government against the bankrupt estate. In these circumstances we believe it appropriate to permit the parties to pursue the desired course of action. The motions are granted." 60-2 BCA at 13,595 (emphasis added).

More recently, the ASBCA cited *Cline* when, on its own motion, it ordered the contractor to show cause why his

appeal should not be dismissed. *B. D. Olson, Trustee in Bankruptcy for Georgia Shipbuilding Corp.*, ABSCA No. 3566, 61-1 BCA L2908. The appeal in that case arose from a default termination, and the Government had filed a proof of claim in bankruptcy proceedings. In issuing its order, the court stated:

> *"Thus Appellant in the present proceedings before this Board is not engaged in the collection of a claim but is defending against a claim asserted by the Government. The record on appeal disclosed, however, that the Government has filed a claim against the bankrupt estate in the bankruptcy proceedings in the District Court incorporating the claim for the alleged excess costs of completion of the gunboats,* and it does not appear that the District Court has entered any order staying proceedings on the Government's claim in that Court pending disposition of the appeal before this Board. *The Government by asserting its claim in the District Court has submitted that claim for adjudication in the District Court.* Claims or defenses which this Board is not empowered to recognize under the contract may be adjudicated in the District Court. The District Court is vested with broad powers to control the assertion of claims against the bankrupt estate. *Under the circumstances it would appear that further proceedings in this appeal would be injudicious and improvident in the absence of an order of the United States District Court for the Southern District of Florida having the effect of staying proceedings on the Government's claim in that court on the ground that the present proceedings before this Board under the "disputes" clause of the contract are necessary or appropriate to an adjudication of the Government's claim in the District Court or are otherwise in the interest of the bankrupt estate.* See GARDNER, TRUSTEE v. NEW JERSEY, 329 U.S. 565, 573 (1947); OLI-

VER FINNIE COMPANY, ASBCA, No. 2099, decided 24 September 1959, 59-2 BCA ¶ 2360; BULK CARRIERS CORPORATION, ASBCA No. 5487, decided 29 January 1960, 60-1 BCA ¶ 2517; CLINE ELECTRIC MANUFACTURING COMPANY, ASBCA Nos. 5472 & 5845; decided 24 June 1960, 60-2 BCA ¶ 2694; COY C. GOODRICH, ASBCA Nos. 6491 & 6492, decided 25 October 1960, 60-2 ¶ 2828. 61-1 BCA ¶ 2908 at 15,181-82 (emphasis added).

108. The Government made no other showing of harm that would result from liquidation of its claims by the Bankruptcy Court. Thus, for example, there is nothing in the record to the effect that specialized technological or other expertise possessed by the ASBCA would be required to determine the Government's claims. The evidence in the record is to the contrary. (Finding 74). Nor, did the Government move for a continuance of the hearing on Gary's objection to its claims. But to the extent that the Government's pleadings did request a continuance the request is unsupported by any evidence. (*See* Findings 12, 15, 17 and 57).

109. Thus, there appears to be a substantial degree of flexibility in the federal policy respecting resolution by the ASBCA of disputes arising out of Governmental contracts. (Findings 105-108). No showing has been made that liquidation by the Bankruptcy Court of the Government's claims will abrade a strong Congressional or other federal policy. (Findings 103, 108). Nor has the Government even commenced an action to terminate, modify, amend or annul to stay of proceedings against the Debtor or shown any cause therefor. (Findings 91-102). To the contrary, the Government has expressly

invoked the jurisdiction of this Court to allow or disallow its claim. (Finding 107).

110. Proceeding to confirm a plan of arrangement subject to the outcome of the hearing in the ASBCA would enable another forum to embarrass and unduly delay the administration of this Chapter XI case because no order of confirmation could be entered by this court until all hearings on all of the six government claims have been finally determined by the ASBCA. There is a reasonable basis for the filing and confirmation of a plan of arrangement by Gary Aircraft Corporation that would be feasible and in the best interest of its creditors. However, no such plan of arrangement can be confirmed until resolution of the Governments' priority claim. Adjudication of Gary as a bankrupt and liquidation of its estate is not an alternative that would be in the best interest of creditors. (Findings 35-43).

111. Liquidation of the Government's claims against Gary before the ASBCA will require an indefinite and unacceptably long period of time before the priority status of the Government's claims can even commence to be reviewed by the Bankruptcy Court. (Findings 66-72). Alternatively, and in addition, the Government has a number of separately pending claims against Gary which ought to be consolidated for hearing. (Findings 51-56). Each of the separately pending claims against Gary, if liquidated by the ASBCA, will require a period of litigation and time for decision that is much too extended to be consistent with successful operation of these Chapter XI proceedings. (Findings 66-72).

112. Moreover, the ASBCA lacks the jurisdiction and expertise to determine many issues at the heart of the

controversy respecting the Government's claims against Gary. (Findings 54, 72). To determine whether the Government's claims against Gary should be allowed as priority claims the Bankruptcy Court must have information as to the value and liquidated amount of Gary's claims against the Government. (Findings 36-40). Thus, were the Government's claims liquidated before the ASBCA, thereafter it would be necessary to commence litigation before this Court respecting the priority status of the claims and of the issues relating to setoff and disallowance of the Government's claims to the extent of the Gary claims against the Government—litigation which would delay further the confirmation of any plan filed by Gary. (Findings 62, 71-72).

113. To permit liquidation of the Government's claims against Gary before the ASBCA would materially interfere with and prevent the orderly administration of this Chapter XI case. (Findings 55-72, 111-12). No plan of arrangement can be confirmed until liquidation of the Government's claims against Gary and determination of whether those claims are entitled to priority. (Findings 35-41). This will be to the detriment of Gary's unsecured creditors. (Findings 42-43). The proceeding regarding the Contract 1645 default issue, which was pending for trial before the ASBCA at the time of the hearing hereon, was applicable only to *one* of the six Government claims against Gary, and the ASBCA may not consider all of the controversy regarding the one claim that is involved. (Findings 54, 70-72). Further, the procedure of the ASBCA will not permit examination of Gary's claims against the Government at all until conclusion of a trial determining whether the Government's termination for default should be converted to one for convenience.

(Finding 70). Thus, for example, should ASBCA determine that Gary was indebted and liable to the Government for $2,500,000 for costs of lost property, the ASBCA could not determine whether the claim should or could be disallowed to the extent of Gary's two claims against the Government until that claim had been fully litigated, and Gary's claim against the Government would not be fully litigated until after conclusion of litigation of whether the Government's termination should be converted to one for default. At the conclusion of the claim for lost property it would be necessary to await litigation elsewhere to determine whether any of Gary's liability to the Government could be extinguished by the extent of the Government's liability to Gary.

114. Thus, liquidation by the Bankruptcy Court of the Government's claims under the facts of this case will not materially infringe a strong Congressional or other federal policy. (Findings 104-110). Liquidation by the ASBCA, however, will materially interfere with and probably prevent the orderly administration of this Chapter XI case. (Findings 110-113).

THE REQUEST TO VACATE

115. The Government's request that the Court vacate a portion of its order setting this Contested Matter for hearing is applicable only to a minor portion of the Government's claims. On June 21, 1977, this Court gave notice of its Order Setting Hearing, Giving Notice and Providing For Further Pleading and to Show Cause. (Finding 9). June 21, 1977 was prior to the date of the first *three* of the Government's *four* proofs of claim. (Finding 2). Only an immaterial portion of the Govern-

ment's total claim was included in the fourth proof of claim but not in the previous proofs of claim.

116. Moreover, since the Government filed its fourth claim rather than apply for a stay of the order pending hearing hereof, its request that the Court vacate a portion of its order is moot respecting the portion of the Government's claims to which the Government's request to vacate is applicable and therefore should be denied.

117. Alternatively, the Government's request that the Court vacate a portion of its order should be denied as a matter of law because the Court has authority to regulate its docket, to require final pleading of claims in connection with control of litigation before the Court and to expedite the administration of proceedings pending before it. The Government's Motion in seeking this Court to vacate a portion of such order fails to recognize the difference between an order that requires that a claim be filed and an order that sets time limits for amendments for claims previously filed. The Government first filed a claim on November 30, 1976. That was seven months *before* the Court's order which the Government asks be partially vacated. The Bankruptcy Court, a Court of Equity, has power to move expeditiously to resolve controversies pending before it. See *Katchen v. Landy, supra.*

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

118. A "Disputes Clause" in a Government contract entered into prior to commencement of a proceeding under the Bankruptcy Act does not divest the Bankruptcy Court of its jurisdiction to allow or disallow claims in

such proceeding that otherwise would be subject to such "Disputes Clause."

119. Under the facts of this case the Bankruptcy Court should not permit liquidation of the Government's claims against Gary before the ASBCA.

120. The Government's request that the Court should stay discovery in this Contested Matter pending hearing before the ASBCA should be denied.

121. The Government's request that this Court should vacate that portion of its Order Setting Hearing, Giving Notice and Providing For Further Pleading and to Show Cause requiring the Government to file amendments to its Proof of Claim by five days prior to July 18, 1977 should be denied.

122. All Findings of Fact may be considered Conclusions of Law, if appropriate. All Conclusions of Law may be considered Findings of Fact, if appropriate. All Findings of Fact and Conclusions of Law not made specifically are deemed made in support of the Order Denying Motion to Stay and Vacate.

The final Order in this action will include provisions giving effect to this Opinion.

SIGNED at San Antonio, Texas, on this 22d day of February, 1979.

/s/ BERT W. THOMPSON
Bert W. Thompson
Bankruptcy Judge

APPENDIX E

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA-76-443-BK

IN THE MATTER OF
GARY AIRCRAFT CORPORATION

DECISION OF THE COURT ON THE
OBJECTION TO THE CLAIM OF
THE UNITED STATES

BE IT REMEMBERED, that heretofore, to-wit on the 22nd day of February, 1979, the above numbered and entitled cause came on for a scheduled recessed meeting of creditors before the Honorable Bert W. Thompson, Bankruptcy Judge.

WHEREUPON, the following proceedings were had, in part, to-wit:

THE COURT: At this time the Court will announce it's decision on the objection to the claim of the United States, filed in the Chapter XI proceedings of Gary Aircraft Corporation.

This matter was tried over an eight month period of time, between July the 18th, 1977 and March the 9th 1978.

The Court had hoped to reach and announce it's decision at an earlier time. However, the Court has been

required to review an enormous amount of material and evidence, including ninety-two volumes of trial transcripts, thousands of documents in evidence, and over one hundred and fifty pages of personal notes taken during the trial. In addition the parties filed extensive briefs and reply briefs, and respectfully prepared voluminous findings of fact and conclusions of law. The Court did not receive the last of the briefs and proposed findings until September the 18th, 1978.

One thing should be dealt with before reaching the merits of the Government's claim. Before the trial the Court was presented with a motion filed by the Government to stay the trial. The Court denied the motion. An opinion of the Court's decision has been prepared and will be entered today.

Before we proceed on the merits of the Government's claim, the Court would say that the lawyers have done an unusual amount of work on the proposed fact findings. It is not the Court's idea that this much effort be spent on the fact findings by the various attorneys in the case. The Government wanted to prepare fact findings and long briefs which went back into the facts in this case in great detail.

Going back over all these fact findings probably contributed as much as anything to the time it has taken to decide this case. On the other hand, the Court appreciates the conscientious efforts the parties have put into the trial briefs and findings.

The fact findings have been meticulously documented with reference to the records and exhibits. And with few exceptions the proposed fact findings will be adopted by

the Court substantially in the same form prepared by the parties. In that regard, since there will be literally hundreds of pages of fact findings, the Court will not add a separate opinion in addition to the fact findings and the order to be entered by the Court.

One of the Government's six claims was for excess reprocurement costs. The Government's claim for reprocurement costs will be disallowed.

The major issues regarding the reprocurement claim involves Gary's quality control program. The Court is not convinced that Gary's overall program was completely free from problems. However, it is the Court's opinion that Gary substantially performed its contract with the Government, until the Government sent a surveillance team, composed of over fifty men, into Gary's facility in Victoria. Thereafter, the Government interfered with Gary's production and brought Gary's engine overhaul program to a standstill.

The surveillance team was triggered by a report made by the General Accounting Office. In the Court's opinion, the actions of the surveillance team was not justified by the GAO audit. Also, in the Court's opinion, the GAO audit was not done in accordance with professional or generally accepted standards. Finally, the GAO audit mainly had to do with Gary's property records, and did not justify interference with Gary's quality control program.

As mentioned earlier, there are hundreds of pages of proposed findings of fact which will be adopted by the Court. Under the circumstances, it is difficult to make many comments about the particular facts of the Gov-

ernment's claim, which will be set out in detail in the findings of fact. But it is appropriate to say at this point that the matter utmost in the Court's mind in reaching its decision was the quality and expertise of the witnesses.

One of Gary's best witnesses in the quality control phase of the case was the chief of quality control for the United States Navy. Several of Gary's best witnesses currently work for the Government, or had formally been employed by the Government for extended periods of time. Most of Gary's witnesses were more knowledgeable, and better informed, and were more experienced than the Government's witnesses.

The Court cannot recall a single witness for Gary whose testimony was filled with contradiction or conflicted with another Gary witness. In short, Gary's witnesses were credible.

Unfortunately, there were several Government witnesses who contradicted each other and were evasive on cross examination. At least one witness for the Government accused another witness for the Government of making a false statement under oath in this case.

The rest of the Government's claims were for Government property lost while performing five Government contracts. The Court will disallow a portion of such claims and allow a portion.

The biggest part of the Government's claim for lost property is for unserviceable property. The unserviceable portion of said claim is based upon certain experimental computer records. There were several days of detailed testimony and a great amount of documentary evidence explaining those computer records.

In the opinion of the Court, the evidence is overwhelming, and may be uncontradicated that the computer records did not show or establish loss of unserviceable property. The Court will, therefore, disallow all of the Government's claim for loss of unserviceable property.

On the other hand, the Court is going to allow some of the Government's claim for loss of serviceable property.

The Government claims that Gary is liable for all downward adjustments in its inventory of serviceable property. Gary contends that its records establish that no serviceable property was lost. Gary has placed in evidence a study which analyzes the downward adjustment of shortages which appear in Gary's records, in light of the upward inventory adjustments or overages which also appear in the records and study.

The study in evidence shows that the shortages and overages of identical or similar items of serviceable property should be properly set off against one another. This study in evidence is summarized in paragraphs 64 through 69 of Gary's proposed findings on lost property.

In addition to the study, Gary offered evidence to show it had a good and sufficient security system. It is the Court's opinion that there was no significant amount of pilfering of Government property. There was a lot of rumor and hearsay. But the Government's evidence on this point was simply not believable or credible.

One of the Government's witnesses testified at length that the serviceable property shortages were merely record keeping errors and not real shortages. Gary's expert witnesses proved that Gary bought and paid for all necessary commercial parts it used in non-Government jobs

worked on during the time period of the Government contract.

There is also other highly persuasive evidence set out in the proposed fact findings. Nevertheless, Gary was required by its contract to keep accurate records of serviceable property. Gary did not always keep good and sufficient records.

It would be difficult for a Court of equity to permit a party to escape liability on the grounds that its records were not sometimes accurate enough to support a claim of liability. Furthermore, even Gary's own brief states Gary is liable as a bailee, under the bailment contract for all serviceable property which it cannot account for.

In the Court's opinion, Gary has made more than a sufficient showing that downward inventory adjustments of serviceable property should be offset where appropriate, against upward adjustments of serviceable property. However, in the Court's opinion, the evidence is not sufficient to warrant the conclusion that all Government serviceable property has been accounted for. The Court concludes that Gary is liable for all serviceable property not specifically accounted for in the aforementioned study.

The next issue is the amount of the Government's claim for loss of serviceable property. The Court will allow the claim for the fair market value of any lost serviceable property.

Mr. Leon Wolfe was called to testify on the value of the Government's serviceable property. He was especially helpful to the Court as an expert witness, in that he buys and sells property of exactly the same type as the serviceable property the Government based its claim on. Some

of the parts he gave testimony on came out of Gary's warehouse in Victoria. It is difficult to find evidence more probative.

In the Court's opinion, his testimony established the fair market value of the subject serviceable property. The Court's holdings on the Government's claim for serviceable property will require revision of the findings as proposed. The Court will allow as a claim for the Government, any serviceable property shortage not accounted for by an overage of a same or similar item, or otherwise explained by specific testimony or evidence.

The revised findings should set out each property overage that accounts for the shortage, according to the aforementioned study, or by other specific evidence or testimony. The findings should then set out the value of each shortage not accounted for, and the total amount thereof, based upon the value for same, as established by the expert witness, Mr. Wolfe.

The Government's claim will be classified as a general unsecured claim, which is not entitled to priority in payment. The Government is not entitled to priority, unless Gary is insolvent.

Although the final liquidated amount for the claim of lost serviceable property is not yet determined, it is clear from a thorough examination of the evidence presented by Arthur Andersen and Company, as well as the other evidence at trial, that Gary's assets, including its claim against the Government, are more than Gary's liabilities, even if the Government's claims for serviceable property were allowed in full.

The Government's claim against Gary will not be entitled to participate in the arrangement or liquidation to the extent of Gary's claim against the Government. It is settled law that claims against a debtor are extinguished by unpaid claims of the debtor against the creditor.

The final issue has to do with whether the Government can set off it's claims against Gary. The general trend of recent authority is to the effect that a creditor is entitled to set offs in straight bankruptcy proceedings, but not in chapter reorganization proceedings. But if an arrangement is confirmed, or if Gary is liquidated, the set off issue is moot, because the Government's claim against Gary will be discharged. For that reason, it is the opinion of the Court that a ruling denying set offs to the Government is premature at this time.

Counsel for Gary will be responsible for preparing and submitting revised and supplemental fact findings in accordance with the Court's decision today. Counsel for Gary is also directed to prepare and submit a proposed order.

Although the fact findings will have to be revised, most of the changes required by this decision can be taken care of promptly. The preponderance of the findings are going to be adopted by the Court in their current form. The information required to revise the fact findings is already contained in the exhibits and fact findings, and really is only to be presented in a different way.

The Court will hope to enter it's final order by the end of March. Accordingly, the Court will expect the

revised findings and proposed order to be filed and served within thirty days.

The Court will look with disfavor on any application for an extension of time, and will grant the same only on a showing of good cause.

At this time the Court will itemize the changes to the fact findings and matters to be covered in the proposed order. The lawyers should take note. The findings should be changed, as follows:

1. Take out the findings on the motion to stay. Most basic findings are contained in the Court's separate opinion on the Government's motion to stay the case.

2. Add to the findings on servicable property and on the value of the serviceable property specific reference to the following:

(a) Each property shortage on each contract, according to the Government's claim;

(b) Each property shortage accounting for an overage, according to Gary's defense;

(c) The fair market value of each shortage not accounted for by an overage.

Any shortage not accounted for by an overage or by specific testimony will be allowed as a claim.

3. Take out the findings which completely disallow the serviceable property claims.

4. Take out the findings on the Government's set off rights.

5. Combine the final proposed findings. Right now there are five or six separate sets of findings. Each set has a different table of contents. The findings are separately numbered in each set of findings. The revised findings should be combined together with one table of contents.

6. The remaining contents do not need to be changed, except to be renumbered, and given new page numbers.

The proposed order should accomplish the following:

1. Disallow the claim for excess reprocurement costs.

2. Disallow the claim for lost unserviceable property.

3. Allow claims for lost serviceable property, unless specifically accounted for in the revised findings.

4. Classify the Government's claim as a general unsecured claim, not entitled to priority in payment.

5. Prohibit the Government's participation in the arrangement and from receiving any distribution in case of a liquidation.

Again, the due date for the revised findings and proposed order is thirty days from today.

* * *

THE STATE OF TEXAS :

COUNTY OF BEXAR :

I, Frances Sherrod, Court Reporter and Notary Public in and for Bexar County, Texas, hereby certify that I was employed to and did report in shorthand the proceedings in the Matter of Gary Aircraft Corporation, before the Honorable Bert W. Thompson, Bankruptcy Judge, on the 22nd day of February, A.D. 1979, and that the foregoing 12 pages of typewriting were prepared by me and contain and constitute a true and correct transcript of my shorthand notes taken at said time and place, and reflect to the best of my skill and ability, an accurate record of the subject proceedings.

WITNESS my hand and seal of office this the 23rd day of February, A.D. 1979.

/s/ FRANCES SHERROD
Frances Sherrod
Court Reporter and Notary Public
in and for Bexar County, Texas

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Chapter XI No. SA-76-BK-443

Contested Matter Respecting Objection To Claim
Of United States Of America

IN RE:
GARY AIRCRAFT CORPORATION
Debtor

ORDER DENYING MOTION TO STAY AND VACATE AND ON CLAIM OF UNITED STATES OF AMERICA

A hearing was held in this Court on the Motion to Stay and Vacate filed in this Contested Matter Respecting Objection to Claim of United States of America, the Claimant in this contested Matter. After hearing and considering the testimony, the documents admitted into evidence, the pleadings and legal memoranda filed herein and the argument of counsel, the Court denied such Motion to Stay and Vacate. Subsequently, the Court delivered its Opinion on Motion to Stay, signed and entered February 22, 1979, in which appear the findings of fact and conclusions of law of the Court in regard to the matters raised by such Motion to Stay and Vacate, and to which reference is hereby made. Thereafter, a hearing was held in this Court upon the claim of the United States of America pursuant to the Preliminary

and Contingent Proof of Claim of the United States of America Entitled to Priority of Payment, dated November 15, 1976 and filed herein on November 30, 1976, as amended by the Amended Proof of Claim of the United States of America Entitled to Priority of Payment, dated April 22, 1977 and filed herein on June 16, 1977, as further amended by the Amended Proof of Claim of the United States of America Entitled to Priority of Payment, dated June 16, 1977 and filed herein on July 5, 1977, as further amended by the Amended Proof of Claim of the United States of America Entitled to Priority of Payment dated July 6, 1977 and filed herein on July 12, 1977. Such hearing was commenced by the objections to the claim of the United States of America raised by the First Amended Motion to Disallow Claim of United States of America, filed herein June 29, 1977 by Gary Aircraft Corporation, the debtor and debtor-in-possession in this Chapter XI case, which pleading amended the Motion to Disallow Claim of United States of America filed herein on June 10, 1977 by Gary Aircraft Corporation. Such objections were joined into by the Official Creditors' Committee herein pursuant to the Intervention of the Official Creditors' Committee in the Proceeding to Disallow Claim of United States of America filed by Gary Aircraft Corporation, debtor-in-possession. After hearing and considering the testimony, the documents admitted into evidence, the pleadings, motions, legal memoranda, argument of counsel, briefs, reply briefs, and the findings of fact and conclusions of law purposed by the parties to the Contested Matter, the Court made the Findings of Fact and Conclusions of Law on Claim of the United States of America, to which reference is hereby made. It is therefore,

ORDERED that Gary Aircraft Corporation as debtor-in-possession be, and it hereby is, permitted to commence or continue litigation seeking the relief of recovery of money or property from the United States of America, separately from this Contested Matter and particularly without adverse effect from the rules respecting compulsory counterclaims; and it is further

ORDERED that the Motion to Stay and Vacate, filed in this Contested Matter by the United States of America be, and the same hereby is, in all respects denied; and it is further

ORDERED that Gary Aircraft Corporation, as debtor and as debtor-in-possession, and its estate, are indebted and liable to the United States of America for costs resulting from loss of property of the United States of America under Air Force Contract No. F41608-71-D-0289, but that such claim be, and it hereby is, reduced from $2,481-253.70 and allowed for the liquidated and determined amount of $26,049.83; and it is further

ORDERED that Gary Aircraft Corporation, as debtor and as debtor-in-possession, and its estate, are not indebted and are not liable to the United States of America under Air Force Contract No. F41608-73-A-3417-0001, and that such claim for $26,210.70 be, and it hereby is, disallowed in its entirety; and it is further

ORDERED that Gary Aircraft Corporation, as debtor and as debtor-in-possession, and its estate, are indebted and liable to the United States of America for costs resulting from loss of property of the United States of America under Navy Contract No. N00019-72-C-0522, and that such claim be, and it hereby is, allowed in the

liquidated and determined amount of $605.71; and it is further

ORDERED that Gary Aircraft Corporation, as debtor and as debtor-in-possession, and its estate, are indebted and liable to the United States of America for costs resulting from loss of property of the United States of America under Navy Contract No. N00019-73-D-0043, and that such claim be, and it hereby is, allowed in the liquidated and determined amount of $25,246.59; and it is further

ORDERED that Gary Aircraft Corporation, as debtor and as debtor-in-possession, and its estate, are indebted and liable to the United States of America for costs resulting from loss of property of the United States of America under Army Contract No. DAAJ01-73-D-0014, and that such claim be, and it hereby is, allowed in the liquidated and determined amount of $7,263.93; and it is further

ORDERED that Gary Aircraft Corporation, as debtor and as debtor-in-possession, and its estate, are not indebted and are not liable to the United States of America for reprocurement costs pursuant to Air Force Contract No. F41608-74-D-1645 because the purported default termination of such contract was erroneous and invalid and must be considered to be a termination for the convenience of the parties, and that such claim for $145,533.52 be, and it hereby is, disallowed in its entirety; and it is further

ORDERED that the aggregate amount of the indebtedness and liability of Gary Aircraft Corporation, as debtor and debtor-in-possession, and its estate to the United States of America, being the sum of $59,166.06, be, and

it hereby is, classified and allowed herein as a general unsecured claim not entitled to priority in payment; and it is further

ORDERED that the claims of Gary Aircraft Corporation against the United States of America under Air Force Contract No. F41608-71-0289 and Air Force Contract No. F41608-71-1645 be, and hereby are, determined sufficient to extinguish the claim of the United States of America allowed herein; and it is further

ORDERED that any distributions otherwise payable by Gary Aircraft Corporation, as debtor and debtor-in-possession, or out of the estate of Gary Aircraft Corporation, be, and hereby are, payable solely out of claims of Gary Aircraft Corporation against the United States of America under Air Force Contract No. F41608-1-0289 and Air Force Contract No. F41608-71-1645 and that the United States of America shall not participate in any arrangement confirmed herein; and it is further

ORDERED that all costs of the Motion to Stay and Vacate and of the Contested Matter Respecting Objection to Claim of United States of America be, and the same hereby are, taxed against the United States of America; and it is further

ORDERED that all relief sought by the parties that is not specifically granted herein be, and the same hereby is in all respects denied.

SIGNED AND ENTERED, at San Antonio, Texas, this 29th day of June 1979.

/s/ BERT W. THOMPSON
Bert W. Thompson
Bankruptcy Judge

APPENDIX G

BANKRUPTCY ACT, 11 U.S.C. § 1, *et seq.* (Supp. 1977)

SECTION ONE, 11 U.S.C. § 1 (Supp. 1977)

§ 1. Meaning of Words and Phrases. The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

. . .

(9) "Court" shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending;

(10) "Courts of bankruptcy' shall include the United States district courts and the district courts of the Territories and possessions to which this Act is or may hereafter be applicable;

(11) "Creditor" shall include anyone who owns a debt, demand, or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy;

. . .

(14) "Debt" shall include any debt, demand, or claim provable in bankruptcy;

. . .

(19) A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder,

or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts;

(20) "Judge" shall mean a judge of a court of bankruptcy, not including the referee;

. . .

(26) "Referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred or anyone acting in his stead;

. . .

SECTION TWO, 11 U.S.C. § 11 (Supp. 1977)

§ 2. Creation of Courts of Bankruptcy and Their Jurisdiction. a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

. . .

(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

. . .

(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise

provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;

. . .

(9) Confirm or reject arrangements or plans proposed under this Act, set aside confirmations of arrangements or wage-earner plans and reinstate the proceedings and cases;

. . .

(12) Discharge or refuse to discharge bankrupts, set aside discharges, determine the dischargeability of debts, and render judgments thereon;

. . .

(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: *Provided, however,* That an injunction to restrain a court may be issued by the judge only;

. . .

b. Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

. . .

SECTION ELEVEN, 11 U.S.C. § 29 (Supp. 1977)

§ 11. Suits By and Against Bankrupts. a. A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition by or against him, shall be stayed until an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until the question of his discharge is determined by the court after a hearing, or by the bankrupt's filing a waiver of, or having lost, his right to a discharge, or, in the case of a corporation, by its failure to file an application for a discharge within the time prescribed under this Act: *Provided, however,* That such stay shall be vacated by the court if, in a proceeding under this Act commenced within six years prior to the date of the filing of the petition in bankruptcy, such person has been granted a discharge, or has had a composition confirmed, or has had an arrangement by way of composition confirmed, or has had a wage earner's plan by way of composition confirmed.

. . .

SECTION FORTY-SEVEN, 11 U.S.C. § 75 (Supp. 1977)

§ 47. Duties of Trustees. a. Trustees shall . . . (8) examine all proofs of claim and object to the allowance of such claims as may be improper; . . .

SECTION FIFTY-SEVEN, 11 U.S.C. § 93 (Supp. 1977)

§ 57. Proof and Allowance of Claims.

. . .

n. Except as otherwise provided in this Act, all claims provable under this Act, including all claims of the United States and of any State or any subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: *Provided, however,* That the court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any State or any subdivision thereof. . . .

SECTION SIXTY-FOUR, 11 U.S.C. § 104 (Supp. 1977)

§ 64. Debts Which Have Priority. a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be . . . (5) debts other than for taxes owing to any person, including the United States, who by the laws of the United States is entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law or who is entitled to priority by paragraph (2) of subdivision c of Section 67 of this Act: *Provided, however,* That such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy.

. . .

CHAPTER XI Arrangements

11 U.S.C. §§ 701-799 (Supp. 1977)

Sec. 301. [11 U.S.C. § 701] The provisions of this chapter shall apply exclusively to proceedings under this chapter.

Sec. 302. [11 U.S.C. § 702] The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors," and "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 322 of this Act, and the date of adjudication shall be taken to be the date of the filing of the petition under section 321 or 322 of this Act except where an adjudication had previously been entered.

. . .

Sec. 311. [11 U.S.C. § 711] Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located.

. . .

Sec. 314. [11 U.S.C. § 714] The court may, in addition to the relief provided by section 11 of this Act and elsewhere under this chapter, enjoin or stay until final

decree the commencement or continuation of suits other than suits to enforce liens upon the property of a debtor, and may, upon notice and for cause shown, enjoin or stay until final decree any act or the commencement or continuation of any proceeding to enforce any lien upon the property of a debtor.

. . .

Sec. 337. [11 U.S.C. § 737] At such meeting, or at any adjournment thereof the judge or referee shall, after the acceptance of the arrangement—

. . .

(2) fix a time within which the debtor shall deposit, in such place as shall be designated by and subject to the order of the court, the consideration, if any, to be distributed to the creditors, the money necessary to pay all debts which have priority, unless such priority creditors shall have waived their claims or such deposit or consented in writing to any provision of the arrangement for otherwise dealing with such claims, and the money necessary to pay the costs and expenses of the proceedings; . . .

Sec. 342. [11 U.S.C. § 742] Where no receiver or trustee is appointed, the debtor shall continue in possession of his property and shall have all the title and exercise all the powers of a trustee appointed under this Act, subject, however, at all times to the control of the court and to such limitations, restrictions, terms, and conditions as the court may from time to time prescribe.

. . .

Sec. 355. [11 U.S.C. § 755] Creditors, including the United States, any State, and any subdivision thereof, shall file their proofs of claim before confirmation except as follows:

(1) if scheduled by the debtor, a claim may be filed within thirty days after the date of mailing notice of confirmation to creditors but shall not be allowed for an amount in excess of that set forth in the debtor's schedules; and

(2) a claim arising from the rejection of an executory contract of the debtor may be filed within such time as the court may direct.

. . .

Sec. 371. [11 U.S.C. § 771] The confirmation of an arrangement shall discharge a debtor from all his unsecured debts and liabilities provided for by the arrangement, except as provided in the arrangement or the order confirming the arrangement, but excluding such debts as, under section 17 of this Act, are not dischargeable.

APPENDIX H

FEDERAL PRIORITY STATUTE

31 U.S.C. §§ 191, 192 (Supp 1977)

§ 191. Priority established

Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

§ 192. Liability of fiduciaries

Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

APPENDIX I

28 U.S.C. § 2705. Bankruptcy rules

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings and motions, and the practice and procedure in cases under title 11.

Such rules shall not abridge, enlarge, or modify any substantive right.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported.

BANKRUPTCY RULES

Rule 101.

COMMENCEMENT OF BANKRUPTCY CASE

A bankruptcy case is commenced by filing a petition with the court by or against a person for the purpose of obtaining his adjudication as a bankrupt.

Rule 102.

REFERENCE OF CASES; WITHDRAWAL OF REFERENCE AND ASSIGNMENT

(a) Reference. Upon the filing of a petition the clerk shall refer the case forthwith to a referee or, if a local rule so provides, to more than one referee concurrently. Thereafter all proceedings in the case shall be before the

referee except as otherwise provided by subsection (b) of this rule, by Rules 115(b) and 920, by § 2a(15) of the Act when a complaint seeks an injunction to restrain a court, by § 43c of the Act when the office of the referee is vacant, and by the provisions in the Act and the rules in Part VIII governing appeals from judgments of the referee.

(b) Withdrawal of Reference and Assignment. The district judge may, at any time, for the convenience of parties or other cause, withdraw a case in whole or in part from a referee and either act himself or assign the case or part thereof to another referee in the district.

Rule 301.

PROOF OF CLAIM

(a) Form and Content; Who May Execute. A proof of claim shall consist of a statement in writing setting forth a creditor's claim and, except as provided in Rules 303 and 304, shall be executed by the creditor or by his authorized agent. A proof of claim for wages, salary, or commissions shall conform substantially to Official Form No. 16 or No. 16A; any other proof of claim shall conform substantially to Official Form No. 15.

(b) Evidentiary Effect. A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.

Rule 302.

FILING PROOF OF CLAIM

(a) Manner of Filing. In order for his claim to be allowed, every creditor, including the United States, any

state, or any subdivision thereof, must file a proof of claim in accordance with this rule, except as provided in Rules 303 and 304.

Rule 306.

OBJECTIONS TO AND ALLOWANCE OF CLAIMS FOR PURPOSE OF DISTRIBUTION: VALUATION OF SECURITY

(a) Trustee's Duty to Examine and Object to Claims. The trustee shall examine proofs of claim and object to the allowance of improper claims, unless no purpose would be served thereby.

(b) Allowance When No Objection Made. Subject to the provisions of subdivision (d) of this rule, a claim filed in accordance with Rule 302, 303, or 304 shall be deemed allowed for the purpose of distribution unless objection is made by a party in interest.

(c) Objection to Allowance. An objection to the allowance of a claim for the purpose of distribution shall be in writing. A copy of the objection and at least 10 days' notice or, if the claim is for taxes, at least 30 days' notice of a hearing thereon shall be mailed or delivered to the claimant. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 701, the proceeding thereby becomes an adversary proceeding.

Rule 914.

PROCEDURE IN CONTESTED MATTERS NOT OTHERWISE PROVIDED FOR

In a contested matter in a bankruptcy case not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for

hearing shall be afforded the party against whom relief is sought. No responsive pleading is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons, complaint, and notice by Rule 704. In all such matters, unless the court otherwise directs, the following rules shall apply: 721, 725, 726, 728-737, 741, 742, 752, 754-756, 762, 764, 769, and 771. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable and relevant in a contested matter in a pending bankruptcy case may proceed in the same manner as provided in Rule 727 for the taking of a deposition before an adversary proceeding. For the purposes of this rule a reference in the rules in Part VII to adversary proceedings shall be read as a reference to contested matters. Notice of an order or direction under this rule shall be given when necessary or appropriate to assure to the parties affected a reasonable opportunity to comply with the procedures made applicable by the order.

Rule 11-5.

REFERENCE OF CASES; WITHDRAWAL OF REFERENCE AND ASSIGNMENT

Bankruptcy Rule 102 applies in Chapter XI cases.

Rule 11-6.

ORIGINAL PETITION

An original petition under Chapter XI of the Act shall conform substantially to Official Form No. 11-F1. An

original and 4 copies of the petition shall be filed, unless a different number of copies is required by local rule. The clerk shall transmit one copy to the District Director of Internal Revenue for the district in which the case is filed, and one copy to the Secretary of the Treasury and, if the debtor is a corporation, one copy to the Securities and Exchange Commission at Washington, District of Columbia.

Rule 11-33.

CLAIMS

(a) Form and Content of Proof of Claim; Evidentiary Effect. Bankruptcy Rule 301 applies in Chapter XI cases.

(b) Filing Proof of Claim.

(1) Manner and Place of Filing. Bankruptcy Rule 302(a), (b), (c), and (d) apply in Chapter XI cases. When the petition is filed pursuant to Rule 11-7, all claims filed in the pending bankruptcy case shall be deemed filed in the Chapter XI case.

(2) Time for Filing. A claim, including an amendment thereof, must be filed before confirmation of the plan except as follows:

(A) if scheduled by the debtor as undisputed, not contingent, and liquidated as to amount, a claim or an amendment to a claim may be filed within 30 days after the date of mailing notice of confirmation to creditors but in such event shall not be allowed for an amount in excess of that set forth in the schedule; and

(B) a claim arising from the rejection of an executory contract of the debtor, and a post-petition claim allowed to be filed under paragraph (3) of this subdivision, may be filed within such time as the court may direct.

(C) Bankruptcy Rule 302(e)(3) applies in Chapter XI cases.

. . .

(e) Objections to and Allowance of Claims; Valuation of Security. Bankruptcy Rule 306 applies in Chapter XI cases.

(f) Reconsideration of Claims. Bankruptcy Rule 307 applies in Chapter XI cases.

Rule 11-14.

PETITION AS AUTOMATIC STAY OF ACTIONS AGAINST DEBTOR AND LIEN ENFORCEMENT

(a) Stay of Actions and Lien Enforcement. A petition filed under Rule 11-6 or 11-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding, except a case pending under Chapter X of the Act, for the purpose of the rehabilitation of the debtor or the liquidation of his estate.

(b) Duration of Stay. Except as it may be deemed annulled under subdivision (c) of this rule or may be terminated, annulled, modified, or conditioned by the

bankruptcy court under subdivision (d), (e), or (f) of this rule, the stay shall continue until the case is closed, dismissed, or converted to bankruptcy or the property subject to the lien is, with the approval of the court, abandoned or transferred.

(c) Annulment of Stay. At the expiration of 30 days after the first date set for the first meeting of creditors, a stay provided by this rule other than a stay against lien enforcement shall be deemed annulled as against any creditor whose claim has not been listed in the schedules and who has not filed his claim by that time.

(d) Relief from Stay. Upon the filing of a complaint seeking relief from a stay provided by this rule, the bankruptcy court shall, subject to the provisions of subdivision (e) of this rule, set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify or condition such stay. A party seeking continuation of a stay against lien enforcement shall show that he is entitled thereto.

(e) Ex Parte Relief from Stay. Upon the filing of a complaint seeking relief from a stay against any act or proceeding to enforce a lien or any proceeding commenced for the purpose of rehabilitation of the debtor or the liquidation of his estate, relief may be granted without written or oral notice to the adverse party if (1) it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the plaintiff before the adverse party or his attorney can be heard in opposition, and (2) the plaintiff's attorney certifies to the court in writing the efforts, if any, which have been made to

give the notice and the reasons supporting his claim that notice should not be required. The party obtaining relief under this subdivision shall give written or oral notice thereof as soon as possible to the trustee, receiver, or debtor in possession and to the debtor and, in any event, shall forthwith mail to such person or persons a copy of the order granting relief. On 2 days' notice to the party who obtained relief from a stay provided by this rule without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its reinstatment, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(f) Availability of Other Relief. Nothing in this rule precludes the issuance of, or relief from, any stay, restraining order, or injunction when otherwise authorized.

Rule 11-63.

GENERAL PROVISIONS

Part IX of the Bankruptcy Rules applies in Chapter XI cases, except that:

(1) The definitions of words and phrases in §§ 306 and 307 of the Act govern their use in the Chapter XI Rules to the extent they are not inconsistent therewith.

(2) The references to various rules in Rule 906(b) shall also include a reference to Chapter XI Rule 11-33 (b)(2).

(3) The references to various rules in Rule 906(c) shall also include references to Chapter XI Rules 11-24 (a), 11-25(a)(1), and 11-33(b)(2).

(4) The exception in Rule 910(c) for "the execution and filing of a proof of claim" shall be read to include also "the execution and filing of an acceptance of a plan" and the reference to Official Forms in that rule shall include a reference to Official Form No. 11-F16.

(5) The reference in Rule 913(b) to "a dischargeable debt" shall be read as "a debt which is or will be provided for by the plan."

(6) The reference in Rule 919(a) to Rule 203(a) shall be read as a reference to Chapter XI Rule 11-24(a).

(7) The reference in Rule 922(b) to Rule 102 shall be read as a reference to Chapter XI Rule 11-5.

(8) The reference in Rule 924 to the time allowed by § 15 of the Act for the filing of a complaint to revoke a discharge shall be read to include also a reference to the time allowed by § 386 of the Act for the making of a motion to revoke the confirmation of a plan.

APPENDIX J

WUNDERLICH ACT, 41 U.S.C. §§ 321, 322 (1976)

§ 321. Limitation on pleading contract-provisions relating to finality; standards of review

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. May 11, 1954, c. 199, § 1, 68 Stat. 81.

§ 322. Contract-provisions making decisions final on questions of law

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative,or board. May 11, 1954, c. 199, § 2, 68 Stat. 81.

APPENDIX K

TITLE 11, UNITED STATES CODE

11 U.S.C. §§ 101, *et seq.*

§ 101. *Definitions.*

In this title—

. . .

(4) "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

. . .

(9) "creditor" means—

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 502(f), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim;

. . .

(11) "debt" means liability on a claim;

(12) "debtor" means person or municipality concerning which a case under this title has been commenced;

. . .

(14) "entity" includes person, estate, trust, governmental unit;

. . .

(21) "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States, a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government;

. . .

SECTION 103 (11 U.S.C. § 103)

§ 103. Applicability of chapters.

(a) Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, or 13 of this title.

. . .

SECTION 105 (11 U.S.C. § 105)

§ 105. Power of court.

(a) The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

. . .

SECTION 106 (11 U.S.C. § 106)

§ 106. Waiver of sovereign immunity.

(a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.

(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—

(1) a provision of this title that contains "creditor", "entity', or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.

SECTION 301 (11 U.S.C. § 301)

§ 301. Voluntary cases. A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

SECTION 362 (11 U.S.C. § 362)

§ 362. Automatic stay.

(a) Except as provided in subsection (b) of this sec-

tion, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate;

. . .

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

. . .

(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—

. . .

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a)(7) of this section, of the setoff of any mutual debt and claim that are commodity futures contracts, forward commodity contracts, leverage transactions, options, warrants, rights to purchase or sell commodity futures contracts or securities, or options to purchase or sell commodities or securities;

. . .

(8) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency.

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; and

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. If the hearing under this subsection is a preliminary hearing—

(1) the court shall order such stay so continued if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the final hearing under subsection (d) of this section; and

(2) such final hearing shall be commenced within thirty days after such preliminary hearing.

(f) The court, without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opporunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

SECTION 501 (11 U.S.C. § 501)

§ 501. Filing of proofs of claims or interests.

(a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.

. . .

(c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.

. . .

SECTION 502 (11 U.S.C. § 502)

§ 502. Allowance of claims or interests.

(a) A claim or interest, proof of which is filed under

section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall deter-termine the amount of such claim as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

> (1) such claim is unenforceable against the debtor, and unenforceable against property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;
>
> . . .

(c) There shall be estimated for purpose of allowance under this section—

> (1) any contingent or unliquidated claim fixing or liquidation of which, as the case may be, would unduly delay the closing of the case; or
>
> (2) any right to an equitable remedy for breach of performance if such breach gives rise to a right to payment.

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such

entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

. . .

SECTION 524 (11 U.S.C. § 524)

§ 524. Effect of discharge.

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor, or from property of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523 or 1328(a)(1) of this title, or that would be so excepted, determined in accordance

with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

. . .

SECTION 541 (11 U.S.C. § 541)

§ 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

. . .

SECTION 542 (11 U.S.C. § 542)

§ 542.Turnover of property to the estate.

. . .

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

. . .

SECTION 704 (11 U.S.C. § 704)

§ 704. Duties of trustee. The trustee shall—

(1) collect and reduce to money the property of the estate for which such trustee serves, and close up such estate as expeditiously as is compatible with the best interests of parties in interest;

. . .

(4) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

. . .

SECTION 1101 (11 U.S.C. § 1101)

§ 1101.Definitions for this chapter. In this chapter—

(1) "debtor in possession" means debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case;

. . .

SECTION 1106 (11 U.S.C. § 1106)

§ 1106. Duties of trustee and examiner.

(a) A trustee shall—

(1) perform the duties of a trustee specified in sections 704(2), 704(4), 704(6), 704(7) and 704(8) of this title;

. . .

SECTION 1107 (11 U.S.C. § 1107)

§ 1107. Rights, powers, and duties of debtor in possession.

(a) Subject to any limitations on a trustee under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(A)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

. . .

SECTION 1111 (11 U.S.C. § 1111)

§ 1111. Claims and interests.

(a) A proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated.

. . .

SECTION 1141 (11 U.S.C. § 1141)

§ 1141. Effect of confirmation.

. . .

(d)(1) Except as otherwise provided in this subsection in the plan, or in the order confirming the plan, the confirmation of a plan—

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h) or 501(i) of this title, whether or not—

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

APPENDIX L

BANKRUPTCY REFORM ACT AMENDMENTS

TITLE 28, UNITED STATES CODE

Sec. 201. (a) Title 28 of the United States Code is amended by inserting immediately after chapter 5 the following:

. . .

"§ 151. Creation and composition of bankruptcy courts

"(a) There shall be in each judicial district, as an adjunct to the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district.

"(b) Each bankruptcy court shall consist of the bankruptcy judge or judges for the district in regular active service. Justices or judges designated and assigned shall be competent to sit as judges of the bankruptcy court.

"(c) Except as otherwise provided by law, or rule or order of court, the judicial power of a bankruptcy court with respect to any action, suit or proceeding may be exercised by a single bankruptcy judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other bankruptcy judges.

Sec. 241. (a) Title 28 of the United States Code is amended by inserting immediately after chapter 89 the following:

. . .

"§ 1471. Jurisdiction

"(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

"(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

"(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

"(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

"(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

. . .

"§ 1481. Powers of bankruptcy court

"A bankruptcy court shall have the powers of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in

the presence of the judge of the court or warranting a punishment of imprisonment.

. . .

Sec. 402. (a) Except as otherwise provided in this title, this Act shall take effect on October 1, 1979.

(b) Except as provided in subsections (c) and (d) of this section, the amendments made by title II of this Act shall take effect on April 1, 1984.

. . .

Sec. 404. (a) The courts of bankruptcy, as defined under section 1(10) of the Bankruptcy Act, created under section 2a of the Bankruptcy Act, and existing on September 30, 1979, shall continue through March 31, 1984, to be the courts of bankruptcy for the purposes of this Act and the amendments made by this Act. Each of the courts of bankruptcy so continued shall constitute a separate department of the district court that is such court of bankruptcy under the Bankruptcy Act.

. . .

APPENDIX M

CONTRACT DISPUTES ACT OF 1978

Pub. L. 95-563, Nov. 1, 1978, 92 Stat. 2383.

28 U.S.C. § 1491 (Supp. 1983)

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Claims Court shall have

jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

. . .

41 U.S.C. § 601 (Supp. 1983)

§ 601. Definitions

As used in this chapter—

(1) the term "agency head" means the head and any assistant head of an executive agency, and may "upon the designation by" the head of an executive agency include the chief official of any principal division of the agency;

(2) the term "executive agency" means an executive department as defined in section 101 of Title 5, an independent establishment as defined by section 104 of Title 5 (except that it shall not include the General Accounting Office): a military department as defined by section 102 of Title 5, and a wholly owned Government corporation as defined by section 846 of Title 31, the United States Postal Service, and the Postal Rate Commission;

(3) The term "contracting officer" means any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and make determinations and findings with respect thereto. The term also includes the authorized representative of the contracting officer, acting within the limits of his authority;

(4) the term "contractor" means a party to a Government contract other than the Government;

. . .

(6) The term "agency board" means an agency board of contract appeals established under section 607 of this title; and

. . .

41 U.S.C. § 602 (Supp. 1983)

§ 602. Applicability of law

(a) Executive agency contracts

Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28) entered into by an executive agency for—

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair or maintenance of real property; or,

(4) the disposal of personal property.

. . .

41 U.S.C. § 605 (Supp.1983)

§ 605. Decision by contracting officer

(a) Contractor claims

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

(b) Review; performance of contract pending appeal

The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with

performance of the contract in accordance with the contracing officer's decision.

. . .

41 U.S.C. § 606 (Supp. 1983)

§ 606. Contractor's right of appeal to board of contract appeals

Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

41 U.S.C. § 607 (Supp. 1983)

§ 607. Agency boards of contracts appeals

(a) Establishment; consultation; Tennessee Valley Authority

(1) Except as provided in paragraph (2) an agency board of contract appeals may be established within an executive agency when the agency head, after consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall have no other inconsistent duties. Workload studies will be updated at least once every three years and submitted to the Administrator.

. . .

(d) Jurisdiction

Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1)

relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Claims Court.

(e) Decisions

An agency board shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes, and shall issue a decision in writing or take other appropriate action on each appeal submitted, and shall mail or otherwise furnish a copy of the decision to the contractor and the contracting officer.

(f) Accelerated appeal disposition

The rules of each agency board shall include a procedure for the accelerated disposition of any appeal from a decision of a contracting officer where the amount in dispute is $50,000 or less. The accelerated procedure shall be applicable at the sole election of only the contractor. Appeals under the accelerated procedure shall be resolved, whenever possible, within one hundred and eighty days from the date the contractor elects to utilize such procedure.

(g) Review

(1) The decision of an agency board of contract appeals shall be final, except that—

(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal

Circuit within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review under section 1295 of Title 28 within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

. . .

41 U.S.C. § 609 (Supp. 1983)

§ 609. Judicial review of board decisions

(a) Actions in United States Claims Court; district court actions; time for filing

(1) Except as provided in paragraph (2) and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(2) In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant to section 1337 of Title 28, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt

by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.

(b) Finality of board decision

In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

(c) Remand or retention of case

In any appeal by a contractor or the Government from a decision of an agency board pursuant to section 607 of this title, the court may render an opinion and judgment and remand the case for further action by the agency board or by the executive agency as appropriate, with such direction as the court considers just and proper.

(d) Consolidation

If two or more suits arising from one contract are filed in the United States Claims Court and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the United States Claims Court may order the consolidation of such suits in that court or transfer any suits to or among the agency boards involved.

(e) Judgments as to fewer than all claims

In any suit filed pursuant to this chapter involving two or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties.

41 U.S.C. § 612 (Supp. 1983)

§ 612. Payment of claims

(a) Judgments

Any judgment against the United States on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 724a of Title 31.

(b) Monetary awards

Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) of this section.

. . .

APPENDIX N

ARMED SERVICES PROCUREMENT REGULATION

7-103.12, 32 C.F.R. § 7-103.12 (1976)

CONTRACT CLAUSES AND SOLICITATION PROVISIONS

7-103.12 *Disputes.*

(a) Except as provided in (b) below, insert the following clause:

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall

proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above: *provided,* that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

The decision of the contracting officer referred to in the above clause shall, if mailed, be sent by certified mail, return receipt requested.

(b) In procurements to be performed outside the United States, its possessions and Puerto Rico, where it is anticipated that the contractor will be a foreign firm, either the clause in (a) above will be used after modifying it to insert "United States" before "court of competent jurisdiction" or the following clause will be inserted: [Omitted].

APPENDIX O

DEFENSE ACQUISITION REGULATION

7-103.12, 32 C.F.R. § 7-103-12 (1982)

CONTRACT CLAUSES AND SOLICITATION PROVISIONS

7-103.12. *Disputes.*

(a) The following clause shall be included in all contracts subject to the Contract Disputes Act unless exempted by the Secretary pursuant to 41 U.S.C. § 602(c).

DISPUTES (1980 JUNE)

(a) This contract is subject to the Contract Disputes Act of 1978 (P. L. 95-563).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved in accordance with this clause.

(c)(1) As used herein, "claim" means a written demand or assertion by one of the parties seeking, as a matter of right, the payment of money, adjustment, or interpretation of contract terms, or other relief, arising under or relating to this contract. However, a written demand by the Contractor seeking the payment of money in excess of $50,000 is not a claim until certified in accordance with (d) below.

(2) A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim for the purposes of the Act. However, where such submission is subsequently disputed either

as to liability or amount or not acted upon in a reasonable time, it may be converted to a claim pursuant to the Act by complying with the submission and certification requirements of this clause.

(3) A claim by the Contractor shall be made in writing and submitted to the Contracting Officer for decision. A claim by the Government against the Contractor shall be subject to a decision by the Contracting Officer.

(d) For contractor claims of more than $50,000, the Contractor shall submit with the claim a certification that the claim is made in good faith; the supporting data are accurate and complete to the best of the Contractor's knowledge and belief; and the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable. The certification shall be executed by the Contractor if an individual. When the Contractor is not an individual, the certification shall be executed by a senior company official in charge at the Contractor's plant or location involved, or by an officer or general partner of the Contractor having overall responsibility for the conduct of the Contractor's affairs.

(e) For contractor claims of $50,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For contractor-certified claims in excess of $50,000, the Contracting Officer must decide the claim within 60 days or notify the Contractor of the date when the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

(g) Interest on the amount found due on a contractor claim shall be paid from the date the Contracting Officer receives the claim or from the date payment otherwise would be due, if such date is later, until the date of payment.

(h) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

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No. 82-1917

In the Supreme Court of the United States

OCTOBER TERM, 1983

GARY AIRCRAFT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

MARC RICHMAN
RICHMOND I. MCKAY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a bankruptcy court ordinarily should defer to the Armed Services Board of Contract Appeals to liquidate government claims against a bankrupt estate arising out of a dispute under a government contract within the jurisdiction of the Board.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 698 F.2d 775. The opinion of the district court (Pet. App. 25a-51a) is unreported. The opinion of the bankruptcy court denying the government's motion to stay proceedings (Pet. App. 54a-106a) is unreported, as is the bankruptcy court's order denying that motion and determining the government's claim (Pet. App. 118a-122a).

JURISDICTION

The judgment of the court of appeals was entered on February 25, 1983. The petition for a writ of certiorari was filed on May 26, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises from the breakdown of a contractual relationship pursuant to which petitioner rebuilt aircraft

engines for the Air Force. The contracts between petitioner and the Air Force contained standardized dispute resolution clauses that provided for an initial administrative determination by the Contracting Officer and review by the Armed Services Board of Contract Appeals ("ASBCA"), with judicial review by the United States Court of Claims (now the United States Court of Appeals for the Federal Circuit) available under the Wunderlich Act, 41 U.S.C. 321. Accordingly, absent the filing on October 28, 1976, of petitioner's bankruptcy petition under Chapter XI of the Bankruptcy Act of 1898, 11 U.S.C. 701 *et seq.*, all claims arising under the contracts would have been determined through the contractual dispute resolution mechanism. Indeed, both petitioner and the United States filed claims for determination through this process, commencing in 1975. Pet. App. 1a-3a, 26a. As the bankruptcy court later noted, at the time of filing of the bankruptcy petition "[a]ll of the Government's claims against [petitioner] and [petitioner's] claims against the Government were pending either before the Administrative Contracting Officer or the ASBCA, in one stage or another of the administrative process * * *" (*id.* at 67a-68a).

In response to petitioner's bankruptcy filing, the United States filed proofs of its claims, which petitioner moved to disallow. The matter was set for a hearing before the bankruptcy court on July 18, 1977. The government then moved the bankruptcy court to stay its proceedings pending liquidation of its claims and petitioner's counterclaims by ASBCA. Although an appealable order denying that motion was not entered by the bankruptcy court until June 29, 1979,[1] the bankruptcy court proceeded to hear and

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[1]The bankruptcy court rendered an opinion (Pet. App. 54a-106a) on the motion on February 22, 1979. The formal written order denying the motion (*id.* at 118a, 120a) was not entered until the later date.

determine the contract claims. The bankruptcy court's decision on the merits was generally unfavorable to the United States. See Pet. App. 120a-122a.[2] The United States District Court for the Western District of Texas affirmed the bankruptcy court's order denying the government's motion to stay and upheld its disposition of the contract claims (*id.* at 25a-51a).

2. The court of appeals reversed and remanded (Pet. App. 1a-24a), holding that the bankruptcy court should have allowed ASBCA to liquidate the contract claims and declining for that reason to reach the government's other grounds for appeal (see *id.* at 5a n.2). The court of appeals reasoned that while not specifically required by statute prior to the enactment of the Contract Disputes Act of 1978, 41 U.S.C. (Supp. V) 601 *et seq.*,[3] the widespread use of mandatory dispute resolution clauses in government contracts was known to and implicitly approved by Congress and that recourse to the Board of Contract Appeals to resolve disputes arising under government contracts advanced a recognized public policy (Pet. App. 5a-9a). In addition, the court concluded that the pertinent provision of the Bankruptcy Actof 1898, 11 U.S.C. 93(d), conferred authority upon the bankruptcy court to defer to another tribunal

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[2]Petitioner was determined not to be liable to the United States on some of the government's claims; those claims were disallowed. Other government claims were liquidated in amounts substantially less than the United States sought. In addition, without purporting to enter any judgment against the United States on petitioner's claims, the bankruptcy court "ascertained" the validity of petitioner's claims against the United States and determined that they were "sufficient to extinguish the claim of the United States" that had been allowed (Pet. App. 122a). The court ruled that the government's claim it had allowed could be satisfied only out of petitioner's claim against the United States, and precluded the United States from participating in any distribution of the bankrupt's assets as a means of satisfying its claim. *Id.* at 120a-122a.

[3]That Act has no application in this case. See page 5, *infra*.

with specialized jurisdiction to liquidate claims presented to the bankruptcy court for allowance (Pet. App. 11a-12a).

Although it found no decision by this Court that resolved the question whether bankruptcy courts should defer to ASBCA (Pet. App. 14a-16a), the court of appeals declined to leave the decision to the standardless discretion of the bankruptcy courts. In framing a rule to guide the bankruptcy courts, the court of appeals noted that deferral would not interfere with the bankruptcy courts' core function of determining whether particular claims should be allowed; that government contracting disputes, including the ones underlying this case, are "technical and esoteric"; that the Board of Contract Appeals is best suited expeditiously to resolve the technical issues that arise in the liquidation of such claims in a uniform manner; and that the existence in many cases (including this one) of counterclaims by the bankrupt against the government that are outside of the bankruptcy courts' jurisdiction and must be determined through the Board of Contract Appeals militates in favor of liquidation by the Board (*id.* at 19a-21a). The court of appeals thus concluded that a bankruptcy court ordinarily "should defer liquidation of a government contracting dispute to the Board of Contract Appeals" (*id.* at 21a; footnote omitted). The case was remanded to the bankruptcy court with instructions to stay further action on the contract claims pending completion of proceedings in the Armed Services Board of Contract Appeals (*id.* at 24a).

ARGUMENT

Petitioner complains that the court of appeals' ruling infringes upon the bankruptcy courts' authority to allow or disallow claims against the estate of a debtor. This contention rests upon a misapprehension of the court of appeals' decision. That decision, which is not alleged to conflict with

any decision of this Court or any other court, is entirely reasonable. Moreover, this case arises under statutory schemes that are no longer in effect. Accordingly, there is no occasion for further review.

1. As the petition makes clear (Pet. 6-8), the decision of the court of appeals resolves a question of first impression. Moreover, the precise question presented is not likely to arise in the future. This case was litigated under the Bankruptcy Act of 1898, 11 U.S.C. 1 *et seq.*, which has been superseded by the Bankruptcy Reform Act of 1978, 11 U.S.C. (Supp. V) 101 *et seq.* In addition, ABSCA's jurisdiction to determine the conflicting claims of petitioner and the United States in this case does not rest upon the subsequently enacted Contract Disputes Act of 1978, 41 U.S.C. (Supp. V) 601 *et seq.* In future cases the question whether a bankruptcy court must defer to ASBCA will be governed by both of these new enactments. Thus, this case lacks sufficient general importance to warrant further review.

To be sure, as petitioner observes (Pet. 13-14), a similar question may arise under the new statutes as to the proper relationship between the bankruptcy courts and ASBCA. But the court of appeals' decision does not address the effect of the new statutes, and the analysis of the problem presented by this case may not be the same under current law. For instance, the provisions of the Contract Disputes Act of 1978 that hereafter mandate the use of disputes resolution clauses in government contracts (see page 3, *supra*; Pet. 13-14; Pet. App. 7a), may well bring more directly into play this Court's decisions holding that a bankruptcy tribunal should defer to the expertise of an administrative tribunal. See *Nathanson* v. *NLRB*, 344 U.S. 25 (1952); *Smith* v.

Hoboken R.R., 328 U.S. 123 (1946); *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561 (1946).[4] Accordingly, this case does not present a suitable opportunity to explore the issues that may arise under the present legislative scheme.

2. The court of appeals' decision embodies a reasonable construction of the old Bankruptcy Act. Petitioner does not challenge the court of appeals' conclusion that the bankruptcy courts have authority to delegate to another tribunal the task of liquidating an unliquidated claim. See Pet. 9. Instead, petitioner contends (*id.* at 9-10) that the court of appeals should have allowed the bankruptcy courts to determine whether to defer to ASBCA on a case-by-case basis, rather than adopting a general rule based upon typical attributes of government contract disputes.

Petitioner offers no persuasive reason why the court of appeals should have entrusted the deferral decision to the unconfined discretion of the bankruptcy courts. The court of appeals determined that significant attributes of government contract disputes that are common to "most, if not all" such disputes militate strongly in favor of liquidation of such claims by the expert tribunal (Pet. App. 21a). In these circumstances, it was appropriate for the court of appeals to provide guidance to the bankruptcy courts subject to its supervision, so as to maximize uniformity in the administration of the law and minimize recurrence of appellate litigation on this subject.[5]

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[4]The court of appeals believed that these decisions were not controlling here because Congress had not yet mandated the incorporation of an administrative dispute resolution mechanism in government contracts at the time that petitioner and the United States entered into the contracts at issue (Pet. App. 17a).

[5]The decision of the court of appeals does not require liquidation by ASBCA where special circumstances would make that inappropriate, such as where unreasonable delay in liquidation would result (Pet. App. 21a n.7).

Petitioner does not directly challenge the court of appeals' assessment that the common attributes of government contract disputes warrant deferral to ASBCA. Rather, petitioner quarrels with the court of appeals' view that these factors were present to a substantial degree in this case (Pet. 10-11). This fact-bound contention does not warrant review.[6] In any event, it is not necessary to the validity of a general rule that the justification for the "bright line" it establishes be equally compelling in every case to which the rule applies. See, *e.g., United States* v. *Ross*, 456 U.S. 798, 807 n.9 (1982); *id.* at 825 (Blackmun, J., concurring); *id.* at 826 (Powell, J., concurring).

3. Contrary to petitioner's suggestion (Pet. 9, 12), this case does not involve the bankruptcy courts' jurisdiction to allow or disallow claims against a debtor. The government conceded below that the bankruptcy court was the sole tribunal with jurisdiction over the allowability of such claims. The only issue resolved by the court of appeals was whether the bankruptcy court or the ASBCA should *liquidate* the government's contract claims. See Pet. App. 5a. The liquidation of a claim is not synonymous with its allowance under the bankruptcy law. See page 3 note 2, *supra*. The court of appeals recognized that the United States would be required to return to the bankruptcy court after liquidation of its claims by ASBCA. Pet. App. 19a-20a, 23a-24a. At that time the issue of allowability of the

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[6]Petitioner asserts (Pet. 10) that the issues to be resolved by the tribunal that liquidates the government's claim are not technical or esoteric. But the district court, which upheld the bankruptcy court's ruling on deferral, remarked (Pet. App. 31a) that the issues were "technical and complex." Moreover, the bankruptcy court's voluminous Findings and Conclusions on the government's claim are overwhelmingly devoted to the details of the parties' contractual dispute, rather than any considerations of bankruptcy law.

government's liquidated claims would be addressed by the bankruptcy court. The court of appeals clearly stated (Pet. App. 23a): "We would not dream of giving the Board of Contract Appeals the broad equitable jurisdiction given to the bankruptcy court, merely because the bankrupt was a party to a government contract."

4. Finally, petitioner's suggestion (Pet. 11-12) that review should be granted to consider additional "important public issues" said to be present in this case is unfounded. Contrary to petitioner's assertions, the court of appeals' decision does not alter the initial presumption of validity of proofs of claim in bankruptcy; neither does it alter the bankruptcy courts' power to discharge untimely claims, or alter or frustrate the performance of the fiduciary duties of a trustee in bankruptcy. Nor does the decision below address the relationship between the rule of deferral announced and the automatic stay provision of the Bankruptcy Act. The court of appeals' decision ensures only that the liquidation of government contract claims is accomplished in a speedy, efficient manner conducive to the uniform treatment of persons similarly situated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

MARC RICHMAN
RICHMOND I. MCKAY
Attorneys

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